Supreme Court, U.S.
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No. 02 - 40

In The

Supreme Court of the United States

ALAN GRECCO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether a defendant's constitutional right to testify should be analyzed as a matter of ineffective assistance of counsel, requiring that the defendant demonstrate prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), or as an independent constitutional violation, requiring that the government demonstrate that any such violation was harmless error.

2) Whether a defendant requesting relief is entitled to a hearing under 28 U.S.C. § 2255 when he has presented facts which, if true, would warrant relief, or whether a more demanding showing of making out a *prima facie* case, as required by the Court of Appeals in this case, governs the question of when and whether a hearing is required.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

1. The United States of America
2. Alan Grecco

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PETITION FOR WRIT OF CERTIORARI

Petitioner Alan Grecco respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on January 31, 2002, in the captioned matter.

CITATIONS OF OPINIONS AND ORDERS

The unreported opinion of the United States Court of Appeals for the Third Circuit, affirming the denial of relief pursuant to petitioner Grecco's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, is annexed beginning at App.1.

The unreported opinion of the United States District Court for the District of New Jersey, denying relief pursuant to petitioner Grecco's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, is annexed beginning at App.21.

The unreported opinion of the United States Court of Appeals for the Third Circuit, denying petitioner Grecco's Petition for Panel Rehearing and Rehearing En Banc, is annexed beginning at App.61.

The unreported Order of the United States Court of Appeals for the Third Circuit, granting in part and denying in part Petitioner Grecco's application for a certificate of appealability, is annexed beginning at App.56.

BASIS FOR JURISDICTION

Petitioner Grecco hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit filed on January 31, 2002. Jurisdiction to review this judgment by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner Alan Grecco respectfully submits that the United States Court of Appeals for the Third Circuit applied an incorrect legal standard to his claim that he was denied his constitutional right to testify in his own defense in violation of his Fifth and Sixth Amendment rights. Moreover, Petitioner contends that the Third Circuit applied an erroneous standard in denying his request for an evidentiary hearing pursuant to 28 U.S.C. § 2255.

The Fifth Amendment to the Constitution of the United States provides in relevant part as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the Constitution of the United States provides in relevant part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.

28 U.S.C. § 2255 provides in relevant part as follows:

> Unless the motion and the files and records of the case conclusively show that the petitioner is entitled to no relief, the court shall . . . grant a prompt hearing thereon. . . .

STATEMENT OF THE CASE

STATEMENT OF PROCEDURAL HISTORY

On June 19, 1991, Petitioner was convicted of conspiracy to violate the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, based upon an illegal gambling business.[1] App.24. One of the predicate acts upon which the conviction was based was an alleged conspiracy to murder Vincent Mistretta ("Mistretta"), App.24, more than ten years before Petitioner was indicted, App.25. The government's proofs with respect to Mistretta's death were based upon the equivocal testimony of a single eyewitness, Frank Galimi. *See* App.25-26; App.33-35. The jury, however, convicted Petitioner and found that the government had established the predicate act that Petitioner had conspired to murder Mistretta. App.25.

[1] On July 20, 1989, Petitioner was indicted on charges of conspiracy to violate the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68. The indictment alleged that Petitioner and others conducted an illegal sports and numbers gambling business. App.24. Petitioner did not challenge his conviction with regard to the charges of operating a gambling business.

The district court sentenced Petitioner to a *de facto* life sentence of sixty-five years, based in large part upon its conclusion that Petitioner had actually murdered Mistretta, a fact not found by the jury. The Third Circuit upheld Petitioner's conviction, *United States v. Gatto*, 995 F.2d 449 (1993), and certiorari was denied, 510 U.S. 948 (1993). On April 21, 1997, Petitioner filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, alleging, among other grounds, that he was denied his constitutional right to testify in his own defense, that counsel was ineffective for failing to call certain expert witnesses for the defense, and that the sentence imposed was illegal. App.24. The district court denied Petitioner's claim regarding his right to testify, in part on the basis that an affidavit submitted by Petitioner in support of his claim that he was denied his constitutional right to testify did not provide sufficient detail as to the anticipated substance of his testimony. App.44. Accordingly, on June 21, 2000, Petitioner filed a motion for relief from the court's judgment under Federal Rule of Civil Procedure 60, including a supplemental affidavit addressing the district court's concerns. App.8. The district court expanded the record to include Petitioner's supplemental affidavit, but denied the requested relief. App.19-20.

On March 23, 2001, the Third Circuit granted Petitioner's motion for a certificate of appealability as to his claim that trial counsel was constitutionally ineffective for failing to properly advise him of his right to testify. App.56-60. Despite having granted Petitioner a certificate of appealability, on January 31, 2002, the Court of Appeals nonetheless affirmed the decision of the district court. App.5. In its opinion, the panel largely adopted the findings of the district court, holding that no evidentiary

hearing or substantive relief was required as Petitioner had not made the required showing of prejudice under the test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). App.3-4. Petitioner filed an application for panel rehearing and rehearing en banc, which was denied on April 3, 2002. App.62.

STATEMENT OF FACTS

In his motion for habeas corpus relief, Petitioner advanced a number of claims of ineffective assistance of counsel, including the allegation that counsel failed to advise him that the decision to testify was Petitioner's alone to make. In support of that claim, Petitioner submitted affidavits from both Michael A. Querques, Esq., App.66-68, and William J. DeMarco, Esq., App.69-71, who represented Petitioner at trial. Those affidavits, along with Petitioner's own affidavits, *see* App.63-65; App.72-77, demonstrated that throughout the course of Petitioner's trial, he informed counsel that he wished to testify in his own defense to rebut the testimony of the government's central witness with respect to the Mistretta murder. Despite Petitioner's desire to testify, the defense rested without calling him. After closing the defense case, Querques commented to Petitioner, "I think enough has been done." App.64. Critically, prior to making this decision for Petitioner, it is undisputed that trial counsel did not inform him that the decision whether or not to testify was Petitioner's alone to make.

The district court determined that these affidavits were insufficient to demonstrate that counsel had failed to advise Petitioner of his right to testify, concluding instead

that the decision not to call Petitioner must have been one of trial strategy. *See* App.44. The trial court further held that even if there was error, Petitioner had not established that the error was prejudicial because he had not presented any evidence to the court to demonstrate what his trial testimony would have been. *See* App.44.

On June 21, 2000, in response to the district court's finding, Petitioner filed a motion for relief from the district court's judgment under Federal Rule of Civil Procedure 60, as well as a supplemental affidavit affirming that, had he testified, Petitioner would have explained that he had not seen Vincent Mistretta for two weeks prior to his murder. App.72. The affidavit provided a more detailed account of his testimony, which the trial court felt was lacking, including an account of Petitioner's whereabouts on the night of Mistretta's murder. Petitioner would have testified that he did not kill Vincent Mistretta, and that he did not see Frank Galimi that night. App.75.

Although the court expanded the record to include Petitioner's supplemental affidavit, App.19-20, it refused to reconsider its decision on Petitioner's § 2255 petition, simply relying upon its earlier ruling that the decision not to call Petitioner was one of trial tactics, App.10-11 – this although neither trial counsels' affidavits nor anything else in the record set forth any factual basis for this conclusion – and holding that Petitioner's testimony would not have changed the outcome of the trial. App.15.

ARGUMENT

I. THE COURT SHOULD ISSUE A WRIT OF CERTIORARI TO DETERMINE WHETHER THE THIRD CIRCUIT APPLIED INCORRECT STANDARDS TO PETITIONER'S APPLICATION FOR HABEAS CORPUS RELIEF.

Supreme Court Rule 10 provides that a petition for a writ of certiorari "will be granted only for compelling reasons" when a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter [or] . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." One of Petitioner's claims in his motion under 28 U.S.C. § 2255 was that trial counsel was constitutionally ineffective for failing to properly advise Petitioner of his right to testify. The Third Circuit's substantive decision on that claim and its decision not to remand the matter to the district court for an evidentiary hearing is in direct conflict with the jurisprudence of this Court as well as other circuits on this very issue. Accordingly, a writ of certiorari should issue.

A criminal defendant enjoys a fundamental, constitutional right to testify in his or her own defense. *Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987) (finding that the right to testify is "[e]ven more fundamental to a personal defense than the right of self-representation"); *Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or to take an appeal."); *see United States v. Teague*, 953 F.2d 1525, 1532-33 (11th Cir. 1992) ("[L]ike the decision to plead not guilty

and proceed to trial, [the Constitution] provides the defendant with an opportunity directly to meet the charges against him."). A defendant's right to testify "can be waived only by the defendant, not defense counsel." *United States v. Leggett*, 162 F.3d 237, 245 (3d Cir. 1998); *accord Chang v. United States*, 250 F.3d 79, 82 (2d Cir. 2001); *United States v. Ortiz*, 82 F.3d 1066, 1070 (D.C. Cir. 1996); *Foster v. Delo*, 39 F.3d 873, 884 (8th Cir. 1994); *United States v. Martinez*, 883 F.2d 750, 756 (9th Cir. 1989), *vacated on other grounds*, 928 F.2d 1470 (9th Cir. 1991). Here, however, defense counsel usurped that right, making this critical decision without full consultation with Petitioner, and specifically, without apprising him that the decision to testify was his to make.

A. The Legal Standard Applied By The Third Circuit With Respect To Petitioner's Claim That He Was Denied The Effective Assistance Of Counsel As He Was Not Properly Advised Of His Right To Testify Is In Conflict With The Law Of This Court And Other Circuits.

In his § 2255 motion, Petitioner argued that trial counsel fell short of their obligation to properly advise him of his right to testify, specifically in that they did not advise Petitioner that the decision whether or not to testify was his alone to make. The Third Circuit affirmed the district court's denial of relief on the ground that Petitioner had not satisfied the prejudice prong of the test for ineffective assistance of counsel. The standard applied by the Third Circuit, however, conflicts with the test applied in other circuits. Accordingly, this Court should

issue a writ of certiorari to resolve the disparate treatment of this issue around the United States.

The Third Circuit has held that it is trial counsel's obligation to educate a defendant concerning his right to testify at trial. *See United States v. Pennycooke*, 65 F.3d 9, 11-13 (3d Cir. 1995) (finding that defense counsel has a duty to advise a defendant regarding the right to testify and the strategic implications of testifying). The failure to satisfy that obligation is analyzed as a Sixth Amendment question of the effective assistance of counsel. *See Leggett*, 162 F.3d at 247 ("[I]t is defense counsel's responsibility, not the trial court's, to make sure that the defendant is informed of the right to testify and that any waiver of the right is valid."); *see also Hooks v. Ward*, 184 F.3d 1206, 1218 (10th Cir. 1999) (finding that the *Strickland* test for ineffective assistance of counsel was the appropriate framework with which to analyze a right-to-testify claim); *Brown v. Artuz*, 124 F.3d 73, 74 (2d Cir. 1997) (same); *Teague*, 953 F.2d at 1534 (same). Accordingly, in this case, when confronted with Petitioner's claim that he was denied his right to testify at trial, both the district court and the Court of Appeals applied the two-pronged test described in *Strickland v. Washington*, 466 U.S. 668, 690, 694 (1984), requiring that Petitioner establish that the performance of trial counsel fell "outside the wide range of professionally competent assistance" and that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Ultimately, the circuit concluded that Petitioner had not raised a colorable claim of ineffective assistance of counsel because he had failed to make any showing with respect to the prejudice prong of the *Strickland* test. *See* App.4.

The Third Circuit's approach, however, conflicts with that utilized by other courts. For example, the Fifth Circuit has held that, because the right to testify is fundamental, and distinctly personal, it should not be analyzed as an aspect of the constitutional right to counsel. *See Jordan v. Hargett*, 34 F.3d 310 (5th Cir. 1994) (rejecting the application of the *Strickland* test and holding that "we believe that the right of a defendant to testify on his own behalf is a fundamental constitutional right entirely separate from his right to counsel."), *vacated on other grounds*, 53 F.3d 94 (5th Cir. 1995); *see also Passos-Paternina v. United States*, 12 F. Supp. 2d 231, 240 (D. Puerto Rico 1998) ("This Court agrees with the Fifth Circuit that the right to testify exists independently of the right to counsel."); *cf. United States v. Dewrell*, 52 M.J. 601, 612 (C.C.A. 1999) (recognizing a split in the circuits regarding the legal analytical framework to be applied to a right-to-testify issue). The *Jordan* court found that "treating a claimed denial of the defendant's right to testify as an ineffective assistance of counsel claim ignores recognition of the right as one personal to the defendant which can never be waived by counsel, competent or not." 34 F.3d at 316 n.5. It followed that, rather than placing the burden of demonstrating prejudice on the defendant under *Strickland*, the *Jordan* court found that if a constitutional error occurred, the government should bear the burden of demonstrating that there was no effect on the jury's verdict. *See id.* at 315-16.

The Fifth Circuit's approach is the proper one, as it more accurately reflects the level of importance that this Court has attached to a criminal defendant's right to testify. *See, e.g., Rock*, 483 U.S. at 52 ("[T]he most important witness for the defense in many criminal cases is the

defendant himself."); *Ferguson v. Georgia*, 365 U.S. 570, 582 (1961) ("[Defendant] above all others may be in a position to meet the prosecution's case."); *Green v. United States*, 365 U.S. 301, 304 (1961) ("The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."). This is particularly true in a "case where the fact of the crime is conceded but the defendant's involvement is the disputed issue." *United States v. Tavares*, 100 F.3d 995, 998 (D.C. Cir. 1996).

In this case, Petitioner was not made aware of the fact that he had the authority to overrule counsel's decision not to have him testify.[2] Had trial counsel permitted Petitioner to testify, as Petitioner told counsel he wanted to, the jury

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[2] In the face of this record, it was inappropriate, and indeed impossible, for the district court and circuit to conclude that the decision to prevent Petitioner from taking the stand was one of trial strategy. *See* App.44. Neither of Petitioner's trial attorneys recalled discussing the fact that it was ultimately Petitioner's decision whether or not to take the stand; certainly, neither characterized the decision as one of trial strategy. Instead, the affidavits demonstrate that Querques believed that Petitioner could testify effectively, *see* App.68, but that at the last moment decided that the defense case was strong enough that Petitioner's testimony was not required, *see* App.64. Not only was this last-minute decision made without consulting his client, but it hardly bespeaks the development of trial strategy, and absolutely does not demonstrate Petitioner's participation in this constitutionally significant decision. Indeed, because Petitioner did not know that he was permitted to override counsel's decision, he was in no position to meaningfully participate in this process, let alone to object to counsel's decision. In light of the evidence that was before the district court, it was inappropriate to assign the protection of trial strategy to such a critical issue without some basis in the record. *See Kimmelman v. Morrison*, 477 U.S. 365, 386-87 (1986) (finding that there must be a rational basis in the record to support a conclusion that counsel's decision was trial strategy).

would have had the opportunity to assess Petitioner's demeanor and credibility as he rebutted the testimony of the government's only witness regarding Mistretta's murder.[3] *See id.* at 997-98. Because the government's case against Petitioner was based upon the suspect testimony of a single witness, the importance of Petitioner's testimony in this regard cannot be gainsaid. *See Strickland*, 466 U.S. at 696 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming support."); *United States v. Desimone*, 119 F.3d 217, 227 (2d Cir. 1997) (noting that the "relative weakness of the government's case may be relevant to the prejudice suffered by a defendant as a result of an erroneous instruction"); *United States v. Lore*, 26 F. Supp. 2d 729, 739-40 (D.N.J. 1998) (noting the weakness of the government's case against the defendant when considering whether counsel's failure to properly advise the defendant of his right to testify resulted in prejudice).

Had this matter been analyzed using the Fifth Circuit's test, it would not have been sufficient for the Court of Appeals simply to hold, as it did, that this Petition had to be denied because it was "silent on the *Strickland* prejudice prong." *See* App.4. Rather, given the facts demonstrating that Petitioner had been deprived of his right to testify, the court would have appropriately placed the burden on the government to demonstrate that this

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[3] Allowing the jury to consider Petitioner's demeanor on the stand was particularly important in this case, because the prosecutor elicited testimony and made arguments in summation regarding Petitioner's demeanor during the trial. *See Gatto*, 995 F.2d at 452-53.

constitutional violation did not effect the outcome of the trial, *i.e.*, that it was harmless error. *See O'Neal v. McAninch*, 513 U.S. 432, 436-438 (1995) (citing *Kotteakos v. United States*, 328 U.S. 750 (1946) and *Chapman v. California*, 386 U.S. 18 (1967), and holding that a Petitioner's claim of constitutional error requires relief if the court is unsure of the effect that the error had on the proceeding and rejecting the claim that a Petitioner must show actual prejudice). The government has not, and indeed, cannot make that showing here.

Given the fundamental nature of a defendant's right to testify in his own defense, this Court should adopt the Fifth Circuit's approach with respect to this issue and instruct the lower courts to consider this right separate and apart from the defendant's right to counsel. *See Jordan*, 34 F.3d at 316 n.5. Without guidance from this Court, the Circuits will continue to apply divergent legal frameworks to this critical and frequently raised constitutional issue. Accordingly, this Court should issue a writ of certiorari to resolve this critical split among the lower courts.

B. The Standard Applied By The Third Circuit To Determine Whether Petitioner Was Entitled To An Evidentiary Hearing Is In Conflict With That Applied By Other Circuits And With The Existing Case Law Of This Court.

Petitioner also argued on appeal that the district court erred in failing to conduct an evidentiary hearing on his claim that he was denied his constitutional right to testify. The Third Circuit affirmed the district court, again finding that because Petitioner had failed to satisfy the *Strickland*

test, a hearing was not warranted. In so doing, the Third Circuit applied a legal test that is in conflict with other Circuits around the country and which departed from the recognized legal standard established by this Court. Accordingly, a writ of certiorari should issue to create a uniform standard to be applied to requests for evidentiary hearings.

In order to obtain an evidentiary hearing on a claim of ineffective assistance of counsel, the Third Circuit requires that a Petitioner set forth a *prima facie* case, satisfying all of the elements of the Petitioner's claim. *See Government of the Virgin Islands v. Weatherwax*, 20 F.3d 572, 580 (3d Cir. 1994) (finding that the court erred when it failed to conduct an evidentiary hearing after petitioner made out a *prima facie* case of ineffective assistance of counsel). Thus, in the Third Circuit "if a nonfrivolous claim does not conclusively fail either prong of the *Strickland* test, then a hearing must be held." *United States v. Dawson*, 857 F.2d 923, 928 (3d Cir. 1998). In applying this test to Petitioner's case, both the district court and the Court of Appeals determined that an evidentiary hearing was not necessary because "Grecco's arguments for an evidentiary hearing to develop a factual record [were] focused singularly on the *Strickland* performance prong and silent on the *Strickland* prejudice prong." *See* App.4. The Third Circuit's test is, however, in conflict with the legal tests applied by other circuits on this very issue.

Title 28 U.S.C. § 2255 sets forth a uniform standard governing the grant of evidentiary hearings: "Unless the motion and the files and records of the case conclusively show that the petitioner is entitled to no relief, the court shall . . . grant a prompt hearing thereon. . . ." Nonetheless, the lower courts have applied this clear principle in

varied manners. For example, some circuits apply a test that is faithful to § 2255. *See, e.g., Payne v. United States*, 78 F.3d 343, 347 (8th Cir. 1996) ("[T]he petitioner is entitled to an evidentiary hearing 'when the facts alleged, if true, would entitle him to relief.'"); *United States v. Magini*, 973 F.2d 261, 264 (4th Cir. 1992) ("A federal court in a habeas proceeding must hold an evidentiary hearing when the petitioner alleges facts which, if true, would entitle her to relief."). There are other circuits, however, that undertake a review of the facts alleged prior to deciding whether to grant an evidentiary hearing. *See, e.g., Rodriguez v. United States*, 286 F.3d 972, 986 (7th Cir. 2002) ("[A] federal prisoner does not have an automatic right to an evidentiary hearing . . . and a court may deny an evidentiary hearing 'if the allegations in the motion are unreasonably vague, conclusory, or incredible, or if the factual matters raised by the motion may be resolved on the record before the district court.'"); *Siciliano v. Vose*, 834 F.2d 29, 31 (1st Cir. 1987) (finding that a hearing will be granted only if the petitioner alleges specific facts in support of the petition). Finally, the Third Circuit, most stringently, will not grant an evidentiary hearing unless the Petitioner makes a *prima facie* showing of each element of the claim raised. *See Weatherwax*, 20 F.3d at 580. At the heart of this conflict, and the gravamen of this case, is the degree of proof that a petitioner must advance to warrant a hearing.

Here, the Third Circuit refused to order a hearing where Petitioner had presented facts which, if true, would certainly have warranted relief. For example, with respect to the error prong of the *Strickland* test, Petitioner claimed that he was never informed that the decision to testify at trial was his alone to make. *See* App.64. The

lower courts, however, disregarded that statement, instead focusing on statements from trial counsel that they did not recall whether they had so advised Petitioner. *See* App.68; App.71. Rather than conducting a hearing to resolve this issue, however, the court simply concluded that Petitioner had not satisfied the error prong of the *Strickland* test. *See* App.43. Other circuits would not have performed such an analysis, but rather would have found that a hearing was required. *See Evans v. United States*, 200 F.3d 549, 551 (8th Cir. 2000) (finding that an evidentiary hearing is required when Petitioner's allegations, if accepted as true, would entitle him to relief); *see also Koskela v. United States*, 235 F.3d 1148, 1149 (8th Cir. 2001) ("Because the record before the District Court contained sharply conflicting evidence, the Court abused its discretion in finding a hearing unnecessary."). Those Circuits would have granted a hearing to permit the Petitioner to create a full record before rendering a decision.

Moreover, the Third Circuit's test, and that of some other Courts of Appeals, conflicts with this Court's precedents. This Court has clearly instructed that Petitioner is entitled to an evidentiary hearing unless the evidence presented conclusively shows that the Petitioner is not entitled to relief. *See Machibroda v. United States*, 368 U.S. 487, 494-95 (1962). Courts must examine a Petitioner's claim to determine whether the facts upon which the claim is based are outside of the record. If they are, a court cannot simply rely upon that ground as a basis to deny relief. *See Sanders v. United States*, 373 U.S. 1, 19-20 (1963). Rather a hearing must be granted for the specific purpose of developing those facts. *See Townsend v. Sain*, 372 U.S. 293, 312-13 (1963) (holding that a Petitioner is entitled to an evidentiary hearing if the relevant issues

are not fully developed in the record), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).[4] Indeed, this Court has recognized that evidentiary hearings are critical to the development of a factual basis upon which a court may ultimately decide a petition for a writ of habeas corpus. *See Wingo v. Wedding*, 418 U.S. 461, 468 (1974) ("More often than not, claims of unconstitutional detention turn upon the resolution of contested issues of fact."). In particular, evidentiary hearings are "necessary to determine whether [a] claim has merit." *See Griffin v. United States*, 109 F.3d 1217, 1220 (7th Cir. 1997). Thus, this case presents the Court with an opportunity to create a uniform standard with respect to evidentiary hearings and to clarify its own position with respect to this issue.

In this case, the Court of Appeals denied Petitioner a hearing using a legal standard at odds with the applicable statute,[5] with the Court's precedents, and with the

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[4] The Court's holding in *Townsend v. Sain* has been overruled with respect to habeas corpus petitions filed pursuant to 28 U.S.C. § 2254, but remains in force with respect to matters filed pursuant to 28 U.S.C. § 2255. *See Stead v. United States*, 67 F. Supp. 2d 1064, 1074 n.5 (D.S.D. 1999) ("Although the AEDPA modified, to some extent, the *Townsend* standard for obtaining evidentiary hearings in 28 U.S.C. § 2254 cases, Congress made no parallel changes in § 2255 practice and evidently chose to leave intact the *Townsend* standard as to create a discrepancy between the right to a hearing in § 2254 and § 2255 cases.").

[5] The decision to deny an evidentiary hearing is also in conflict with the Third Circuit's decision to grant Petitioner a certificate of appealability. Specifically, 28 U.S.C. § 2253 requires that the Court of Appeals issue a certificate of appealability only when a petitioner makes a "substantial showing of the denial of a constitutional right." This standard – in practice, a high one – is met when a petitioner can demonstrate that the district court's determination on the merits of the claim was incorrect. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)

(Continued on following page)

jurisprudence of the other Circuits. In order to correct this error, and to clarify the law with respect to the critical question of when a hearing is required under 28 U.S.C. § 2255, the petition for a writ of certiorari should be granted and the matter remanded for a full hearing of the issues raised by Petitioner.

CONCLUSION

For these reasons, petitioner Alan Grecco respectfully requests that the Court grant his petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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GRIFFINGER & VECCHIONE
A Professional Corporation
Attorneys for Petitioner
Alan Grecco
LAWRENCE S. LUSTBERG
PHILIP JAMES DEGNAN

On the Petition:

LAWRENCE S. LUSTBERG, ESQ.
PHILIP JAMES DEGNAN, ESQ.

Dated: July 2, 2002

(requiring that a "prisoner demonstrate substantial underlying constitutional claims"). The panel's conclusion, then, that the record was "silent" on the issue of prejudice does not square with its grant of a certificate of appealability.

NOT PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 00-1861, 00-2970

ALAN GRECCO,
Appellant

v.

UNITED STATES OF AMERICA

Appeal from the United States District Court
For the District of New Jersey
D.C. No.: 97-cv-2098
District Judge: Honorable Harold A. Ackerman

(Argued: January 17, 2002)

Before: SCIRICA, ROSENN, *Circuit Judges*, and KANE,* *District Judge.*

(Filed: January 31, 2002)

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* Hon. Yvette Kane, Middle District of Pennsylvania, Sitting by Designation.

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Philip James Degnan, Esq.
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Robert J. Cleary, U.S. Attorney
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Maureen A. Ruane, Assistant U.S. Attorney (Argued)
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Counsel for Appellee

OPINION

PER CURIAM

This appeal involves whether Appellant Alan Grecco was denied effective assistance of counsel because his trial counsels failed to inform him of his right to testify in his own defense. We must also determine whether the District Court erred in not conducting an evidentiary hearing before denying any relief. Because the parties are intimately familiar with the case, and this case has been before this Court twice before, once on an interlocutory appeal, *United States v. Gatto,* 924 F.2d 491 (3d Cir. 1991), and then, on direct appeal, *United States v. Gatto,* 995 F.2d 449 (3d Cir. 1993), we recite herein only the very essential facts.

In June 1991, Grecco was found guilty by a jury for the murder of Vincent Mistretta. Unsuccessful in his

direct appeal, he filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 alleging that he was denied effective assistance of counsel because his trial counsels failed to advise him of his right to testify. Without an evidentiary hearing, the District Court on April 17, 2000, denied the motion in its entirety. Then, Grecco supplemented his prior affidavit that the District Court had found lacking in specificity, and requested relief from the April 17th judgment pursuant to Rule 60. On August 4, 2000, the District Court denied that motion finding that nothing in the supplemental affidavit alters its prior decision.

He appealed from both the denial of his § 2255 petition and Rule 60 motion, and on March 23, 2001, this Court consolidated those two appeals and granted a certificate of appealability under 28 U.S.C. § 2253, "limited to the issue of whether trial counsel provided ineffective assistance in failing to advise Grecco fully as to his right to testify." Grecco urges that his trial counsels were ineffective because they failed to inform him that the ultimate decision as to whether to or not testify was his to make and that this failure was "outside the range of professionally competent assistance" and that it was prejudicial because "the addition of his testimony to the defense case would have altered the outcome of his trial."

After carefully reviewing the District Court decision that accompanied both the April 17th and August 4, 2000, orders, briefs of Grecco and the government before this Court, the record including Grecco's supplemental affidavit submitted with the Rule 60 motion, and the oral arguments before this Court on January 17, 2002, we are convinced that Grecco has failed to show that he was

denied effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668 (1984). Grecco has proffered no persuasive arguments for us to disturb the District Court judgment. We rely substantially on the thoughtful and persuasive opinion of the District Court.

At a minimum, Grecco contends that he was entitled to an evidentiary hearing. He argues that "it is clear that Grecco presented a prima facie case of ineffective assistance of counsel under the *Strickland* test and the district court should have conducted an evidentiary hearing to create a complete record concerning the issue." To be sure, 28 U.S.C. § 2255 states that the District Court shall grant a hearing unless the record "conclusively show that the prisoner is entitled to no relief." Again, we are in agreement with the District Court "that each portion of [Grecco's] § 2255 motion fails conclusively with respect to one or both prongs of the *Strickland* analysis." Grecco's arguments for an evidentiary hearing to develop a factual record is focused singularly on the *Strickland* performance prong and silent on the *Strickland* prejudice prong. *See, e.g., United States v. Dawson,* 857 F.2d 923, 928 (3d Cir. 1988) ("If a nonfrivolous claim clearly fails to demonstrate either deficiency of counsel's performance or prejudice to the defendant, then the claim does not merit a hearing.").

Lastly, we note that Grecco had also raised several other grounds of ineffective assistance of counsel, and sentencing related claims, but the District Court had likewise denied relief. Notwithstanding the clear language in this Court's March 23, 2001, order granting the limited certificate of appealability, Grecco claims that the certificate was too limited. He argues that this panel should reconsider the decision of the certificate of appealability panel. Putting aside this panel's lack of authority to

disturb a decision of another panel, Grecco does little besides incorporate by reference the arguments raised in his memorandum of law before the certificate of appealability panel. If appellant is dissatisfied with the decision of a prior panel, then his recourse, as with any other decision, is to petition for panel rehearing, and not to seek review collaterally.

The orders of the District Court are affirmed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 00-1861, 00-2970

ALAN GRECCO,
Appellant.

v.

UNITED STATES OF AMERICA

Appeal from the United States District Court
For the District of New Jersey
D.C. No.: 97-cv-2098
District Judge: Honorable Harold A. Ackerman

(Argued: January 17, 2001)

Before: SCIRICA, ROSENN, *Circuit Judges,*
and KANE,* *District Judge.*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued on January 17, 2002.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the Orders of the District Court of April 17, 2000, and August 4, 2000, be

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* Hon. Yvette Kane, Middle District of Pennsylvania, Sitting by Designation.

and the same is hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Marcia M. Waldron, Clerk

Dated: January 31, 2002

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALAN GRECCO, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	)	Civil Action No. 97-2098 (Harold A. Ackerman, U.S.D.J.) **OPINION & ORDER** (Filed Aug. 4, 2000)

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ACKERMAN, District Judge:

This matter comes before the court on petitioner Alan Grecco's motion, pursuant to Federal Rule of Civil Procedure ("Rule") 60(b), for relief from this court's April 17, 2000 judgment.[1] Petitioner urges this court to reexamine its previous decision in light of petitioner's

[1] The court notes that the April 17, 2000 opinion contained two typographical errors. An amended opinion correcting these errors was filed with the clerk's office on July 24, 2000 and mailed to the parties. The typographical errors do not alter the substance of the court's decision or the date of the court's decision.

supplemental affidavit and the affidavit of Stefano Mazzola. In the alternative, petitioner requests that this court conduct an evidentiary hearing to receive petitioner's full proffer of testimony. Finally, petitioner asks the court to expand the formal record in this matter, pursuant to Rule 7 of the rules governing 28 U.S.C. § 2255 proceedings, to include the supplemental affidavits of petitioner and Stefano Mazzola. For the reasons set forth below, petitioner's motion is denied in part and granted in part.

The court will not at this stage reiterate the factual background and procedural history of the case, but refers the parties to its April 17, 2000 opinion. In that opinion, this court denied Grecco's 28 U.S.C. § 2255 petition in its entirety. In the present motion, petitioner asks the court to revisit one particular aspect of its decision.

In his petition, Grecco asserted that he received constitutionally ineffective assistance of counsel. This claim was based, in part, on the allegation that his trial counsel failed to inform him fully regarding his right to testify. Specifically, petitioner asserted that his trial counsel did not inform him that the ultimate decision of whether he should testify was his decision to make. In support of the claim, petitioner presented his own affidavit and the affidavits of trial counsel Michael Querques, Esq. and William DeMarco, Esq. Petitioner also requested that the court conduct an evidentiary hearing to receive testimony and assess the merits of the claim. This court denied petitioner's request for an evidentiary hearing and held that petitioner failed to satisfy his burden of proving ineffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668

(1984). The court found that petitioner's claim failed on both prongs of the *Strickland* analysis. *See* Opinion of April 17, 2000 at 18-22 (noting that under *Strickland,* a petitioner must demonstrate both: (1) that his attorney failed to meet an "objective standard of reasonableness" in representing the petitioner; and (2) that petitioner suffered "prejudice" as a result of his counsel's unprofessional errors. (citing *Strickland,* 466 U.S. at 687)).

First, this court held that petitioner failed to prove that his counsel's conduct was "objectively unreasonable." Although counsel must inform a client that it is the client's right to decide whether to testify, petitioner did not meet his burden of proving that his counsel failed to inform him of his rights. As noted in the April 17, 2000 opinion, Grecco's affidavit in this regard is not accorded significant weight in light of his interest in the § 2255 petition. Counsel's affidavits are inconclusive and do not substantiate petitioner's claim. Counsel simply state that they do not recall specifically informing Grecco of his right to decide whether to testify. Moreover, as discussed in the previous opinion, the fact that Grecco testified in his own defense in a previous criminal proceeding suggests that he was aware of his right to decide whether to testify. In addition, if petitioner genuinely expected to testify up until the moment the defense rested its case, it would seem that petitioner would have protested and that counsel would recall such protests. Counsel do not refer to any such protests in their affidavits. Also, petitioner did not raise this claim on direct appeal.

Considering all of these factors, this court found that there is no evidence that counsel's decision not to call petitioner to the stand was anything other than a

reasonable tactical decision in this case. Nothing in petitioner's supplemental affidavit alters that conclusion. Accordingly, this court has no reason to reconsider its original conclusion that petitioner failed to prove that his counsel's conduct was objectively unreasonable. Thus, this court may conclude its analysis at this point based on petitioner's continued failure to satisfy the first of the two required prongs under *Strickland*. *See Strickland,* 466 U.S. at 697 (holding that there is no need for a court to address both components of the *Strickland* inquiry if the petitioner makes an insufficient showing on one component).

This court, however, will nonetheless address the crux of petitioner's argument in this motion, *i.e.*, the impact of the supplemental affidavit on the court's previous determination that petitioner was not prejudiced by any error committed by trial counsel. This court held that petitioner did not demonstrate prejudice because he did not set forth specific testimony that he would have offered at trial and did not detail how such testimony would rebut the government's case. In the present motion, petitioner asks the court to grant relief from the April 17, 2000 judgment in light of his supplemental affidavit, which sets forth the testimony petitioner would have offered at trial. Petitioner asserts that such relief is warranted under Rule 60(b).

Rule 60(b) provides, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;

> . . . or (6)any other reason justifying relief from the operation of the judgment . . .

The general purpose of Rule 60 is "to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done." *Boughner v. Secretary of Health. Educ. and Welfare,* 572 F.2d 976, 977 (3d Cir. 1978). Motions under Rule 60(b) are addressed to the sound discretion of the trial court. *See Ross v. Meagan,* 638 F.2d 646, 648 (3d Cir. 1981); *Boughner,* 572 F.2d 976, 977 (3d Cir. 1978); *Dietsch v. United States,* 2 F. Supp.2d 627, 631 (D.N.J. 1998). Rule 60(b) however, does not confer upon the district courts a "standardless residual of discretionary power to set aside judgments." *Moolenaar v. Government of the Virgin Islands,* 822 F.2d 1342, 1346 (3d Cir. 1987) (citations omitted). Rather, "[t]he remedy provided by Rule 60(b) is 'extraordinary, and special circumstances must justify granting relief under it.'" *Moolenaar,* 822 F.2d at 1346 (quoting *Page v. Schweiker,* 786 F.2d 150, 158 (3d Cir. 1986) (Garth, J., concurring)).

Petitioner asserts that, under Rule 60(b)(6), this court should consider the supplemental affidavit presented with this motion and grant him relief from the April 17, 2000 judgment. Specifically, petitioner submits that because the court's rejection of the ineffective assistance claim in his § 2255 petition was based on petitioner's failure to set forth the testimony he would have offered at trial, the court should now consider the supplemental affidavit and grant him relief from the denial of his petition. He argues that any interest in finality of judgments is outweighed by the "extreme injustice" that will be suffered if the court refuses to consider the proffered testimony. *See* Petitioner's Brief at 8. The government, on the other hand,

contends that petitioner's Rule 60 motion should be denied as a tardy attempt to present facts that could have and should have been presented at an earlier stage.

The government relies on *Moolenaar v. Government of the Virgin Islands* for the proposition that "a party that has not presented known facts helpful to its case by witnesses available to it 'when it had the chance cannot ordinarily avail itself of Rule 60(b) after the adverse judgment has been handed down.'" 822 F.2d at 1347 (quoting *Good Luck Nursing Home, Inc. v. Harris,* 636 F.2d 572, 577 (D.C. Cir. 1980)). Indeed, Rule 60(b) "cannot . . . be employed simply to rescue a litigant from strategic choices that later turn out to be improvident." *Marshall v. Board of Education,* 575 F.2d 417, 424 (3d Cir. 1978). However, petitioner notes that "the district court is not powerless to correct errors into which it is led by the parties' failure to make the key facts known. When a party timely presents a previously undisclosed fact so central to the litigation that it shows the initial judgment to have been manifestly unjust, reconsideration under Rule 60(b)(6) is proper even though the original failure to present the information was inexcusable." *Good Luck Nursing Home,* 616 F.2d at 577.

In this case, particularly because the Rule 60(b)(6) motion was timely filed after the court's April 17, 2000 judgment, the court may consider the new factual submissions in order to determine whether the original judgment was "manifestly unjust." *See Good Luck Nursing Home,* 636 F.2d at 577. By contrast, in the *Moolenaar* case, the plaintiffs neglected to present certain evidence initially and then sought to introduce the new evidence years later under Rule 60(b). *See* 822 F.2d at 1347. The court in

Moolenaar, noting the absence of extraordinary circumstances, denied the plaintiffs' Rule 60 motion. *See id.* at 1348. Moreover, the court in *Moolenaar* found that its case was distinguishable from the *Good Luck Nursing Home* case. In *Good Luck Nursing Home,* the parties did not present certain evidence initially because they expected that a hearing would be granted. *See* 822 F.2d at 1347. Thus, in that case, the court, and not the plaintiff, was responsible for the failure to present evidence. *See id.* In that instance, the court had "sufficient reason" to invoke Rule 60(b). *See id.* The court in *Moolenaar* also found it significant that the Rule 60(b)(6) motion in *Good Luck Nursing Home,* unlike the motion in *Moolenaar,* was made very shortly after the judgment. *See id.*

The present case is similar to *Good Luck Nursing Home* in that Grecco sought an evidentiary hearing in his original petition. However, petitioner has had several opportunities to present an affidavit concerning his proffer of testimony. Petitioner could have included an affidavit with his original petition; he also could have proffered the testimony in his first supplemental affidavit, which was submitted in response to the government's answer. Indeed, in its answer, the government criticized the "scant assertions" offered by Grecco concerning his claim that counsel provided ineffective assistance regarding his fundamental right to testify. Despite the government's argument, petitioner's first supplemental affidavit did not set forth the testimony he would have offered at trial. It is somewhat suspect that petitioner comes forward only now, at the eleventh hour, with a second supplemental affidavit and the affidavit of Stefano Mazzola.

In any event, the affidavits now offered by petitioner do not alter the court's previous judgment. As stated in the

April 17, 2000 opinion, petitioner has not proffered testimony which, if presented at trial, creates a reasonable probability that the jury would have reached a different result. The supplemental affidavits, even if considered, do not remedy this deficiency. As the government notes, petitioner's proffered testimony, as contained in the supplemental affidavit, does not concretely rebut the government's case.

First, petitioner asserts that on the evening Mistretta was murdered, Grecco went to the Service Diner at about 7:30 p.m., then went to the Meadowlands Race Track at about 8:15 p.m., and stopped at the George Michaels Diner to pick up the newspaper on the way home. He was arrested upon leaving the George Michaels Diner. The trial testimony of law enforcement officers confirms that Grecco was at both diners at the stated times. (Trial Transcript 2374-2377; 6282-6292).[2] Therefore, Grecco's testimony serves only to add that during the time between the two diner stops, Grecco was at the racetrack rather than committing the murder of Mistretta. This self-serving affidavit, standing alone, does not provide the type of testimony that is reasonably likely to result in a different outcome in this case. Petitioner's trial counsel presented an alibi defense that was rejected by the jury. It is not reasonably likely that petitioner's testimony at trial would have resulted in a different outcome. Moreover, Stefano Mazzola's corroboration of Grecco's account is highly suspect in light of its production at this late stage.[3] Further,

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[2] The trial transcript will herein after be cited as "T."

[3] It should be noted that Gerald E. Hanlon, Esq., attorney for Stefano Mazzola, has objected to this court's consideration of his client's affidavit. Because the affidavit was obtained without the knowledge or

(Continued on following page)

Grecco submits that he saw Galimi from time to time after Mistretta's murder and Galimi never mentioned Mistretta's death or showed any ill will toward Grecco. However, this fact, if true, does not necessarily undermine Galimi's testimony that he saw Grecco commit the murder. The testimony certainly does not create a reasonable probability of a different outcome. As such, all things considered, the proffered testimony does not significantly undermine the government's case against Grecco.

Petitioner also proffers testimony that allegedly rebuts the trial testimony of Howard Clarke and Robert Belli. These witnesses testified as to the gambling and RICO charges against petitioner. However, in his § 2255 petition. Grecco "does not challenge his conviction with regard to the charges of operating a gambling business." *See* Brief of Petitioner in Support of his Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, p. 3 n.2. Grecco's § 2255 petition only challenges his conviction to the extent that the jury found him guilty of conspiracy to murder, and the overt act of murdering, Vincent Mistretta. Therefore, petitioner's ability to rebut the testimony of Howard Clarke and Robert Belli, who testified only as to the gambling and RICO charges, is irrelevant to the merits of his § 2255 petition.

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presence of counsel, Mr. Hanlon has asked that the affidavit be withdrawn. This court will permit Mr. Hanlon to withdraw his client's affidavit. Nevertheless, even if this court considered Mr. Mazzola's affidavit, it would not alter the court's April 17, 2000 judgment. This court finds it significant that Mazzola's testimony was not presented at an earlier point: the testimony was not offered at trial, not presented on direct appeal and not included in Grecco's § 2255 petition. The affidavit is highly suspect in light of this late presentation and thus would not alter the April 17, 2000 judgment.

However, even if the court considers this proffer of testimony, petitioner has not demonstrated a reasonable probability that the jury would have reached a different conclusion as to any of the charges. First, as the government notes, the only real difference between petitioner's proposed testimony and Clarke's testimony at trial is that Grecco claims he never slapped Clarke during their confrontation. Petitioner asserts that John Haas, who observed the encounter, said that he did not see petitioner slapped Clarke. Clarke was cross-examined at trial concerning John Haas' statement, which contradicted Clarke's testimony. *See* T. 5703-5710. Thus, petitioner's testimony in this regard would have been cumulative of other evidence presented at trial. Moreover, even if Grecco's testimony is believed, it is not reasonably probable that the jury's determination as to his guilt of the racketeering act of using extortionate means to collect an extension of credit would have been different.

Second, petitioner's proffer of testimony concerning Robert Belli is largely consistent with the testimony presented by the government's witnesses at trial. The only difference is petitioner's denial of his involvement in the baseball bat beating of Robert Belli. This bare, self-serving testimony does not establish a reasonable probability that the jury would have decided the racketeering charge differently if Grecco had testified a trial.

In his reply brief, petitioner asserts that the government improperly dismissed his supplemental affidavit as self-serving. Petitioner correctly notes that all exculpatory statements of a criminal defendant are self-serving and that such statements should not automatically be discredited on that basis. This court agrees that petitioner's affidavit should not be dismissed simply because it is to

some extent self-serving. However, this court must determine whether petitioner's testimony creates a reasonable probability that the jury would have reached a different result. In making that determination, this court finds it significant that petitioner's assertions are self-serving and largely unsubstantiated, and that the assertions do not significantly affect the government's case against him. Moreover, as discussed above, the corroboration offered by Stefano Mazzola, even if it was considered by this court, is highly suspect in light of its submission at this late date and would not alter the court's original judgment. Put simply, this court is not convinced that there is a reasonable probability that petitioner's testimony at trial would have led the jury to reach a different conclusion. Accordingly, even considering the recent proffer of testimony, petitioner has not demonstrated that he suffered prejudice as a result of counsel's alleged error.[4] Therefore, petitioner has not presented the court with "extraordinary circumstances" which warrant relief from judgment under Rule 60(b).

Next, petitioner again asks this court to hold an evidentiary hearing in this matter. In its April 17, 2000 opinion, this court declined petitioner's request for a hearing. *See* Opinion at 6 n.3. This court again declines petitioner's request. For the reasons stated in the April 17, 2000 opinion and in this opinion, petitioner has not made a sufficient showing to warrant an evidentiary hearing.

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[4] Moreover, as noted above, this court has held that petitioner's claim fails on the ineffective assistance prong as well as the prejudice prong. *See infra* 2-3. Accordingly, even if petitioner can demonstrate prejudice, the claim nonetheless fails because petitioner has not demonstrated that counsel committed error.

Finally, petitioner moves the court to expand the formal record in this case to include the affidavits of both himself and Stefano Mazzola. In support of his request, petitioner cites Rule 7 of the rules governing 28 U.S.C. § 2255 proceedings. Rule 7(a) provides that the court may "direct that the record be expanded by the parties by the inclusion of additional material relevant to the determination of the merits of the petition." Rule 7(b) further indicates that "affidavits may be submitted and considered as part of the record." Petitioner asserts that because this court did not conduct an evidentiary hearing, it is critical that Grecco's testimony be made part of the record in order to permit a complete review of the petition on appeal. The government responds that while expansion of the record was appropriate during the pendency of the petition before this court, it is not appropriate to expand the record after the court has issued its ruling. The government submits that such a belated submission should not be made part of the formal record in this case.

I find that an expansion of the record is to some extent appropriate in this instance. There is nothing in the text of Rule 7 that prohibits the filing of a Rule 7 application after the disposition of a § 2255 petition. In the particular circumstances of this case, it is appropriate to include Grecco's supplemental affidavit in the formal record. Grecco's supplemental affidavit is certainly relevant to the resolution of this motion and may be helpful to the Court of Appeals in reviewing Grecco's § 2255 petition. Thus, although the court does not condone petitioner's submission of his supplemental affidavit at the eleventh hour, the record will be expanded to include Grecco's supplemental affidavit. However, since Stefano Mazzola's affidavit has

been withdrawn, it will not be included in the formal record in this case.

THEREFORE IT IS ON THIS 4th day of August 2000;

ORDERED that petitioner's motion under Rule 60(b) for relief from this court's April 17, 2000 judgment is DENIED;

ORDERED that petitioner's request for an evidentiary hearing is DENIED;

ORDERED that petitioner's request for expansion of the record, pursuant to Rule 7 of the rules governing 28 U.S.C. § 2255 proceedings, is GRANTED as to Alan Grecco's supplemental affidavit and DENIED as to Stefano Mazzola's affidavit.

/s/ Harold A. Ackerman

Hon. Harold A. Ackerman,
U.S. District Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALAN GRECCO, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	)	Civil Action No. 97-2098 (Harold A. Ackerman, U.S.D.J.) **ORDER** (Filed April 17, 2000)

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ACKERMAN, District Judge:

This matter having come before the court on the petition of Alan Grecco for relief pursuant to 28 U.S.C. § 2255; and this court having carefully considered the arguments submitted in support of, and in opposition to, the petition; and for the reasons expressed in an opinion issued on this same day;

IT IS ORDERED on this 17th day of April, 2000, that Alan Grecco's petition pursuant to 28 U.S.C. § 2255 is DENIED.

/s/ Harold A. Ackerman
Hon. Harold A. Ackerman
U.S. District Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALAN GRECCO, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	Civil Action No. 97-2098 (Harold A. Ackerman, U.S.D.J.) **OPINION** (Filed Apr. 17, 2000)

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Newark, New Jersey 07102

ACKERMAN, District Judge:

This matter comes before the court on petitioner Alan Grecco's motion for a writ of habeas corpus pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct the sentence imposed by this court in *United States v. Grecco,* Criminal No. 89-250. Petitioner claims that he received ineffective

assistance of counsel both at trial and at sentencing and also argues that his sentence was imposed in violation of the due process and ex post facto clauses of the United States Constitution. For the reasons set forth below, petitioner's motion is denied.

I. Background

On July 20, 1989, petitioner Alan Grecco was charged, in a nine count indictment, with violations of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), conspiracy to violate RICO, and several gambling offenses. Seven co-defendants were indicted along with the petitioner. After six of his co-defendants pled guilty to reduced charges, petitioner and co-defendant Louis Gatto, Sr. proceeded to trial on a seven-count redacted indictment. Count One of the redacted indictment charged Grecco and Gatto with conspiracy to violate RICO and Count Two charged them with violating RICO by engaging in a pattern of six predicate acts related to the gambling business. The charged predicate acts were as follows: (1) conspiring to obtain a competing gambling business through the extortion of Arthur and Robert Belli and the murder of Arthur Belli; (2) conspiring to obtain the competing gambling business of James Barbarula by acts of extortion; (3) conspiring to murder Vincent Mistretta, with the overt act being Grecco's murder of Mistretta; (4) using extortionate means to collect an extension of credit from Howard Clarke, a bookmaker associated with the enterprise; (5) operating an illegal sports gambling business; and (6) running an illegal numbers gambling business. Counts Three through Seven charged Grecco and Gatto with various gambling offenses.

On June 19, 1991, a jury found both Grecco and Gatto guilty on all counts of the indictment and on all charged predicate acts.[1] Thereafter, petitioner was sentenced by this court to a term of imprisonment of 65 years, the maximum penalty for the combined offenses. Petitioner then filed a timely appeal of his sentence, alleging a number of errors committed during his trial and sentencing. The Third Circuit affirmed the convictions and sentences of both Grecco and Gatto. *See United States v. Gatto,* 995 F.2d 449 (3d Cir. 1993).

In the present motion, petitioner requests that the court vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Specifically, petitioner challenges his conviction and sentence on the third predicate act of the RICO charges: the conspiracy to murder, and the overt act of murdering, Vincent Mistretta.[2]

On April 26, 1979, outside his apartment building, Vincent Mistretta was beaten and killed with an ice pick. The primary eyewitness, Frank Galimi, testified that he saw Alan Grecco flee the scene and that Mistretta's last words named Grecco as the assailant. After the government and the defense each presented its case, the jury found Grecco guilty of conspiracy to murder, and the act of murdering, Mistretta.

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[1] It should be noted that with respect to the first predicate act, the jury did not find the petitioner guilty of the murder of Arthur Belli, which was one of two means of committing the predicate act of conspiracy to take over the Belli gambling business.

[2] Petitioner does not challenge his conviction and sentence on counts three through seven of the indictment, the gambling charges.

Petitioner now contends that he received constitutionally ineffective assistance of counsel with respect to that charge. Petitioner argues that his trial counsel erred in five crucial respects: (1) failing to call certain expert witnesses, including an expert on eyewitness identification, an expert on astigmatism, an expert on the effects of drugs and psychological problems on an eyewitness's perception and memory and an expert on the victim's psychological and perception problems; (2) taking petitioner to visit Moncato before Moncato testified; (3) "opening the door" to admission of certain 911 tapes; (4) failing to advise petitioner of his right to testify at trial; and (5) failing to challenge the finding in the presentence report that petitioner killed Mistretta. Petitioner further alleges that he suffered prejudice as a result of these errors, as demonstrated by newly discovered evidence proving his innocence. Finally, petitioner claims that the court improperly applied the United States Sentencing Guidelines in sentencing him. He contends that the court should have applied U.S.S.G. § 2A2.1, rather than U.S.S.G. § 2A1.1. Petitioner argues that this error in applying the Guidelines constitutes a violation of the due process and ex post facto clauses of the Constitution. For each and all of these reasons, the petitioner requests that this court vacate, set aside or correct his sentence. The government opposes the petitioner's motion and asserts that Grecco received both a fair trial and a fair sentence.

II. Ineffective Assistance of Counsel

Section 2255 permits a convicted and detained defendant to collaterally challenge a conviction and sentence once the appeals process has been exhausted or waived. Thus, ordinarily, a petitioner for habeas corpus may only

raise claims which have already been addressed on direct appeal. *See* 28 U.S.C. § 2255. However, a claim of ineffective assistance of counsel is properly raised in a petition for habeas corpus as it is not realistic for a prisoner to raise the issue at an earlier time when the same attorney was present throughout the trial and appeals process. *See United States v. DeRewal,* 10 F.3d 100, 103 (3d Cir. 1993) (noting that it is not possible for counsel to argue on appeal that his own efforts have been ineffective). Further, a failure to raise this claim on direct appeal does not need to be explained by the petitioner during collateral review. *See id.* at 104 (addressing "cause and prejudice" standard under *United States v. Frady,* 456 U.S. 152 (1982), which requires petitioner to demonstrate why new issue was not raised on direct appeal).

Claims of ineffective assistance of counsel are analyzed pursuant to the standard set forth by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984). Under that standard, a petitioner must demonstrate: (1) that his attorney failed to meet an "objective standard of reasonableness" in representing the petitioner; and (2) that petitioner has suffered "prejudice" as a result of his counsel's unprofessional errors. *See id.* at 687. In examining whether an attorney's conduct meets the first part of the two-pronged test, courts must determine whether, in light of all the circumstances in the case, "the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690. With regard to the second part of the test, courts must determine whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id* at 694. A reasonable probability is one "sufficient to undermine confidence in

the outcome." *Id.; see also Lockhart v. Fretwell,* 506 U.S. 364, 372 (1993) (holding that the "prejudice" component of the *Strickland* inquiry "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." (citing *Strickland,* 466 U.S. at 687)).

A claim for ineffectiveness of counsel will not succeed unless the petitioner satisfies both prongs of the *Strickland* test. *See id.* at 687. Therefore, once a court determines that one part of the test has not been met, the petitioner's ineffectiveness claim fails, and the court need proceed no further with the analysis. *See id.* at 697 ("[T]here is not reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order [as the *Strickland* court] or even to address both components of the inquiry if the defendant makes an insufficient showing on one . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.").

In assessing the merits of an ineffectiveness claim, a court must recognize that an attorney is generally given wide latitude in preparing and executing a defense strategy. *See id.* at 688. Judicial scrutiny will give deference to the actions of counsel, and a court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689. Additionally, counsel's conduct must be examined in the context of the time it occurred. *See id.* at 690; *see also Lockhart,* 506 U.S. at 372

(finding contemporary assessment of counsel's conduct must be made when evaluating effective assistance).

The petitioner here claims that his counsel was deficient in several respects. I will address each of petitioner's allegations of ineffective assistance in turn.[3]

A. Expert Witnesses

Petitioner first claims that his counsel was constitutionally ineffective for failing to call certain expert witnesses to testify at trial.[4] Because of the lack of physical evidence linking petitioner to Mistretta's murder, petitioner asserts that Galimi's eyewitness testimony was of critical importance to the government's case against him.

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[3] Petitioner has requested that this court hold an evidentiary hearing on his § 2255 motion. He contends that a hearing is necessary to enable the court to consider the testimony of several proposed witnesses, including certain expert witnesses, Lorraine DiGiulio, and himself. The Third Circuit has held that a hearing may be required on a § 2255 motion that is based on ineffective assistance of counsel. *See e.g., United States v. Nahodil,* 36 F.3d 323, 327 (3d Cir. 1994); *United States v. Dawson,* 857 F.2d 923, 928 (3d Cir. 1988). However, "[i]f a nonfrivolous claim clearly fails to demonstrate either deficiency of counsel's performance or prejudice to the defendant, then the claim does not merit a hearing . . . that is, if a nonfrivolous claim does not conclusively fail either prong of the Strickland test, then a hearing must be held." *Dawson,* 857 F.2d at 928. In accordance with that standard, this court finds that a hearing is not necessary in this matter. The motion will be decided on the basis of the existing record, as well as the memoranda of law, appendices and affidavits submitted by the parties. Based on those materials, and for the reasons set forth below, the court finds that each portion of petitioner's § 2255 motion fails conclusively with respect to one or both prongs of the *Strickand* [sic] analysis. Put simply, this court conclusively finds that petitioner was represented at all times by highly competent counsel.

[4] Petitioner was represented at trial by attorneys Michael A. Querques, Esq., William J. DeMarco, Esq., and Alan Zegas, Esq.

Accordingly, petitioner argues that his trial counsel should have attacked Galimi's testimony with all available means Specifically, petitioner claims that his trial counsel should have called to the stand an expert on eyewitness identification, an expert on astigmatism (a condition from which Galimi suffers), an expert on the impact of drug use and psychological problems on one's perception and memory and an expert on the victim's psychological and perception problems. Petitioner asserts that the failure of his trial counsel to investigate or call to the stand any such experts satisfies both prongs of the *Strickland* analysis. The government disagrees and contends that neither prong of the *Strickland* test is satisfied in this case.

First, petitioner argues that his trial counsel's failure to investigate and failure to call to the stand such expert witnesses constitutes unprofessional and ineffective assistance of counsel under the first prong of the *Strickland* analysis. Petitioner argues that, particularly in a case such as this, where eyewitness testimony is of critical importance, it is not objectively reasonable to omit relevant and helpful expert testimony. Petitioner claims that this failure was not a reasonable strategic decision on the part of trial counsel because there was no downside to presenting such evidence. The government responds that trial counsel's decision not to call such experts to testify represents a reasonable trial strategy, and does not amount to ineffective assistance. The government further notes that there are always potential downsides associated with the presentation of expert testimony, including cost to the client, extension of the length of the trial and confusion of the jury. The government argues that petitioner's counsel pursed a reasonable trial strategy in deciding to attack Galimi's eyewitness identification with

vast and vigorous cross-examination, rather than expert testimony.

At the outset, many courts have established that matters of trial strategy, such as decisions concerning which witnesses to call to testify at trial, are entrusted to the sound discretion of counsel. *See Wainwright v. Sykes,* 433 U.S. 72, 93 (1977) (Burger, C.J., concurring); *United States v. McGill,* 11 F.3d 223, 227-28 (1st Cir. 1993); *Government of the Virgin Islands v. Weatherwax,* 77 F.3d 1425, 1434 (3d Cir. 1996); *United States v. Long,* 674 F.2d 848, 855 (11th Cir. 1982). "The decision whether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial." *United States v. Nesserian,* 824 F.2d 1294, 1321 (2d Cir. 1987). If counsel's tactical decision has a rational basis, a court is without authority to second-guess counsel's judgment call. *United States v. Dent,* 1999 WL 717114 at 6 (E.D. Pa. Sept. 10, 1999) (citing *Weatherwax,* 77 F.3d at 1436)).

In the present case, petitioner's trial counsel decided upon a defense strategy consisting of vigorous cross-examination of the sole eyewitness to the murder, coupled with presentation of an alibi defense. Even if, in hindsight, expert testimony may have been marginally helpful to the defense, it cannot be said that trial counsel's decision not to utilize such testimony was unreasonable at the time the decision was made. *See Lockhart,* 506 U.S. at 372 (finding contemporary assessment of counsel's conduct must be made when evaluating effective assistance). As noted by the government, there are always downsides to presenting expert testimony, such as cost, waste of time and jury confusion. Indeed, trial counsel Michael Querques remarked that he is "dedicated to not using experts, because

I think experts can hurt you in certain situations." *See* T. 3011-13.[5] Rather, in this case, defense counsel decided to use cross-examination to attack Galimi's testimony. *See* T. 3001; 3008. Defense counsel further noted that certain areas of proposed expert testimony, such as the effects of drugs and alcohol on Galimi's ability to perceive and recall accurately, were within the common knowledge of jurors. *See* T. 3012-13. Under the circumstances, and considering trial counsel's decision in the context of the time in which it was made, I find that trial counsel was reasonable in deciding not to present expert witness testimony.

Moreover, one of the factors used by courts to determine whether the strategic decisions of counsel are reasonable is the attorney's level of experience. *See Strickland,* 466 U.S. at 681. In this case, petitioner's primary trial attorney, Michael Querques, had both vast experience and a well-deserved reputation as a fine lawyer. Petitioner's other attorneys at trial, Alan Zegas and William De Marco, were equally experienced and possessed of similar expertise. Thus, this court will accord a high degree of deference to the strategic decisions of petitioner's trial counsel. Their collective experience and reputation bolster the government's argument that the decision not to call certain expert witnesses was "sound trial strategy," and not negligence. *See id.* at 689.

Further, petitioner relies on *United States v. Downing,* 753 F.2d 1224 (3d Cir. 1985), and its progeny for the proposition that the jury in this case should have heard expert testimony concerning eyewitness identification and

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[5] The citation "T." refers to pages of the trial transcript in this matter.

that his trial counsel was constitutionally ineffective for failing to offer such testimony. However, petitioner's reliance on *Downing* is misplaced. *Downing* addressed the admissibility of expert testimony on eyewitness identification under Federal Rule of Evidence 702 when such testimony is offered by a party. The Third Circuit Court of Appeals held that such testimony *may* be admitted when eyewitness identification is a central issue in the case and the proposed testimony meets a three part balancing test. *See id.* at 1226-27. The court did not hold that such testimony *should* be offered or that trial counsel would be ineffective for failing to do so. The government correctly notes that petitioner's argument, taken to its extreme, would mean that counsel would be ineffective for failing to offer such expert testimony in any case where eyewitness identification is important. That conclusion is not supported by *Downing,* which simply holds that eyewitness identification may be a proper subject of expert testimony when such testimony is offered by a party and when it satisfies a three part balancing test. *See id.*

Rather than presenting expert testimony, trial counsel in the present case opted to rely on cross-examination and presentation of an alibi defense. This strategy was reasonable under the circumstances. Indeed, several of the topics petitioner now contends should have been the subject of expert testimony were investigated by his counsel and presented to the jury through alternate methods. For instance, petitioner's counsel elicited testimony from Galimi that he wore glasses at the time of the identification, that he suffered from astigmatism and that the consequences of astigmatism include blurred vision and tired eyes. T. 3562-63. Also, although this court did not allow defense counsel to address all of Galimi's past

treatments for psychological and drug problems, cross-examination was permitted as to Galimi's use of drugs and his 1968 hospitalization for drug addiction. T. 3216-17; 3222-3241; 3250-3262; 3365-67. Counsel also questioned Galimi concerning his two hospitalizations for depression and anxiety in 1983 (T. 3524-3542) and his 1989 evaluation by a government psychologist for possible inclusion in the Witness Protection Program (T. 3631-34; 3728-3769). Again, it was a reasonable tactic for trial counsel to rely on cross-examination concerning these topics and to forego expert testimony. *See Smith v. Angelone,* 111 F.3d 1126, 1132-33 (4th Cir. 1997) (trial counsel was reasonable in relying on cross-examination of the government's expert rather than presenting its own expert).

Further, as noted by the government, defense counsel attacked Galimi on numerous other grounds, including taking money from the government (T. 3193-3200; 3398-3415); lying to authorities and the grand jury in this case (T. 3208-09); receiving an undesirable discharge from the Marines (T. 3212); pleading guilty to aggravated assault (T. 3212-13) and receiving stolen goods (T. 3428-30); making prior inconsistent statements (T. 3509; 3859-67; 3880-89); and numerous incidents showing he had an explosive personality (T. 3243-44; 3332-37; 3272; 3337-39). Defense counsel also challenged Galimi's identification of petitioner by presenting an alibi defense (T. 7091-95); suggesting that Mistretta had numerous enemies other than petitioner (T. 7157-64); arguing that the weather and lighting conditions were not favorable on the night of the murder (T. 7175-7181); eliciting that, on the night of the murder, Galimi was repeatedly asked by a detective to identify a picture of the petitioner (T. 3388-3395); and suggesting that Galimi agreed to testify against petitioner

because Galimi was in desperate financial condition (T. 3776-80). It simply cannot be said, in the face of such vigorous and wide ranging cross-examination and presentation of evidence that trial counsel's conduct was objectively unreasonable.

In addition, rather than calling an expert witness on Mistretta's ability to perceive and identify his attacker accurately, defense counsel employed alternate methods. After meeting with one of Mistretta's doctors, defense counsel opted not to call the doctor as a witness (T. 5451-52; 5489-90; 5382-86) and instead used cross-examination and the stipulated testimony of various lay witnesses. In addition to exposing Mistretta's past criminal activity, defense counsel elicited testimony that Mistretta was a heavy drinker (T. 2852), was paranoid about the petitioner and blamed him for everything (T. 3355; 3436), was crazy (T. 2851; 2894-95; 3345-51; 6562), and even that Mistretta's mother wanted to have him committed to an institution to help him mentally (T. 2892). Thus, it was reasonable for defense counsel to conclude that expert testimony was unnecessary concerning Mistretta's ability and motive to identify petitioner as his attacker.

Petitioner further argues that his trial counsel was ineffective not only for failing to call expert witnesses, but in neglecting to investigate such potential testimony. Counsel's failure to investigate potential defense witnesses may be constitutionally deficient when the failure is based upon an incomplete investigation and counsel's limitation on the investigation was unreasonable. *See United States v. Gray,* 878 F.2d 702, 710 (3d Cir. 1989); *United States v. Kauffman,* 109 F.3d 186, 190 (3d Cir. 1997). In the cases cited by petitioner, there was a *complete* failure to investigate either the entire case or a particular defense. In *Gray,*

defense counsel performed no investigation whatsoever. 878 F.2d at 711-12. In *Kauffman,* counsel refused to investigate a potential insanity defense even after receiving a letter from a doctor stating that the defendant was "manic and psychotic." 109 F.3d at 188-90. Instead, counsel advised his client to plead guilty. *Id.* In *Workman v. Tate,* counsel failed to interview the only two eyewitnesses to the defendant's alleged criminal conduct and subsequent arrest. 957 F.2d 1339, 1345 (6th Cir. 1992). In *Sims v. Livesay,* counsel did not conduct an independent investigation of the crime and did not hire a forensic expert to examine significant evidence at the scene of a shooting. 970 F.2d 1575, 1580-81 (6th Cir. 1992). Defense counsel in this case, however, certainly did not engage in such a failure to investigate. Trial counsel's investigation was neither incomplete nor unreasonable. Defense counsel made a reasonable investigation, presented an alibi defense, and chose to present much of the testimony that petitioner now contends should have been the subject of expert testimony, through cross-examination.

It should be noted that "[t]he right to counsel does not require that a criminal defense attorney leave no stone unturned and no witnesses unpursued . . . [a]n attorney need not fully investigate every potential avenue if he or she has reasonable grounds for not doing so." *Berryman v. Morton,* 100 F.3d 1089, 1101 (3d Cir. 1996). In this case, defense counsel now assert that they did not consider or investigate possible expert testimony as to eyewitness identification or astigmatism. *See* Querques Aff. at ¶¶ 3-6; DeMarco Aff. at ¶¶ 3-6. Defense counsel, however, had reasonable grounds for not investigating or calling certain expert witnesses in light of the rest of the defense case.

The decision was based on a rational and informed understanding of the pitfalls of expert testimony and an awareness of alternate methods for attacking the government's case.

Thus, considering the wide latitude given to counsel, the decision not to present expert testimony was objectively reasonable, and counsel was not ineffective under the first prong of the *Strickland* analysis.

Moreover, even if counsel's conduct was deficient, petitioner has not demonstrated "prejudice" under the second prong of the *Strickland* analysis. Petitioner argues that because the government's case against him rests substantially on Galimi's eyewitness testimony, any additional attack on Galimi's credibility may have altered the outcome of the case. Petitioner points out that "a verdict . . . only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Gray,* 878 F.2d at 711 (quoting *Strickland,* 466 U.S. at 696). However, as noted above, much of the evidence that petitioner now claims should have been the subject of expert testimony, was presented to the jury through alternate means. *See infra.* p. 10-12. Expert testimony would not have added anything of significance to the defense case. As such, the minimal value of the proposed expert testimony, assuming that such testimony was not excluded under federal Rule of Evidence 403, does not support the existence of a "reasonable probability" of a different outcome in this case.

In sum, the omission of certain expert testimony in this case did not render the proceeding fundamentally unfair, nor does is [sic] undermine confidence in the

outcome of the trial. *See Lockhart,* 506 U.S. at 372; *Strickland,* 466 U.S. at 687, 694. The government's case against the petitioner, particularly Galimi's testimony and Mistretta's identification, did not go unchallenged. Defense counsel mounted a significant, thorough attack on the government's case, as well as on its primary witness. Petitioner has not demonstrated that there is a reasonable probability that, but for counsel's allegedly unprofessional errors, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 694.

Accordingly, petitioner's trial counsel was not constitutionally ineffective for failing to call any or all of the following expert witnesses: an expert on eyewitness identification; an expert on astigmatism; an expert on the impact of drug use and psychological problems on one's perception and memory and an expert on the victim's psychological and perception problems.

B. Visit to Eyewitness Moncato's Home

Petitioner next argues that his trial counsel was constitutionally ineffective for taking him to visit Victor Moncato, a defense eyewitness, before Mr. Moncato testified at petitioner's trial. He contends that this visit gave the impression that petitioner tried to intimidate Mr. Moncato. Petitioner claims that this suggestion was extremely prejudicial in a case which involved organized crime and which was already rife with accusations of witness intimidation. *See Gatto,* 995 F.2d at 451-453 (describing alleged threats by courtroom spectator Moe Brown against prosecution witness Robert Belli). The government responds that the visit was neither unreasonable trial strategy nor prejudicial to the petitioner.

Trial counsel's decision to take petitioner to visit Moncato, prior to Moncato's testimony, was a matter of trial strategy and thus is afforded a considerable degree of deference. *See Strickland*, 466 U.S. at 688-90. Moncato had previously given a description of Mistretta's assailants which did not match petitioner's physical characteristics. Apparently, defense counsel wished to have Moncato view the petitioner prior to testifying in order to be sure of Moncato's testimony that neither of the men he observed on the night of Mistretta's murder was the petitioner. This was a reasonable strategy and was not prejudicial to the petitioner.

As the government correctly notes, the prosecution's reference, during cross-examination of Moncato, to possible intimidation was extremely subtle. T. 6023-25. Moreover, this suggestion of intimidation was challenged on redirect, when defense counsel elicited testimony that the visit was friendly and hospitable. T. 6036. Most importantly, in a statement to police long before the alleged intimidation, Moncato gave a description of the assailants which did not match petitioner's physical appearance. These prior consistent statements significantly undercut any suggestion that Moncato was intimidated into giving testimony exculpating the petitioner. Therefore, this court does not find that, but for the alleged error, there is a reasonable probability that the outcome of the case would have been different.

Thus, petitioner has not demonstrated that trial counsel was ineffective for taking petitioner to visit Moncato. The visit was neither an unreasonable trial strategy nor prejudicial to the petitioner.

C. Opening the Door to Admission of the 911 Tapes

Next, Petitioner submits that his trial counsel was constitutionally ineffective for opening the door to the admission of highly damaging and prejudicial 911 recordings. Petitioner claims that his trial counsel was unreasonable in questioning FBI Agent Costello concerning the timing of the 911 call reporting Mistretta's murder. He asserts that trial counsel should have predicted that such questioning would prompt the admission into evidence of the content of the tapes. The tapes contained a police officer's statement, based on Galimi's call, that petitioner had murdered Mistretta. The tapes further referenced a prior altercation between petitioner and Mistretta, as well as Mistretta's continuing paranoia concerning the petitioner. Petitioner asserts that he was particularly prejudiced by the admission of the tapes because they were the last pieces of evidence presented to the jury before closing arguments. The government argues that Agent Costello's testimony concerning the timing of the 911 call was critical to defense counsel's presentation of an alibi defense. In any event, the government contends that admission of the tapes was not prejudicial to the petitioner.

As the petitioner points out, the Third Circuit has held that opening the door to the admission of prejudicial and otherwise inadmissible evidence may constitute ineffective assistance of counsel. *See Berryman*, 100 F.3d at 1099-1102. In the present case, however, counsel's conduct was neither unprofessional nor prejudicial to the petitioner. The timing of the 911 call was extremely pertinent to counsel's non-frivolous alibi defense. The parties dispute whether defense counsel should have foreseen the eventual admission of the entire content of

the tapes. Regardless, the petitioner was not prejudiced by the admission of the tapes. Granted, petitioner did not want the 911 tapes to be the last piece of evidence heard by the jury. However, the admission of the tapes at that time, or any time, does not create a reasonable probability of a different outcome in the case.

Importantly, the jury had previously heard the allegedly prejudicial content of the 911 tapes during the government's case. *See* T. 6507-08. Edward Puzio, of the Garfield Police Department, as well as Galimi and Anthony La Duca, testified concerning the prior altercation between Mistretta and petitioner. Puzio further testified that Galimi told him of Mistretta's paranoia concerning petitioner. Thus, although such testimony was reiterated at an inopportune time for the defense, admission of the 911 tapes was not prejudicial under *Strickland*. Because the jury was already aware of the content of the tapes, it is wholly improbable that admission of the tapes themselves altered the outcome of the case.

D. Failing to Advise Petitioner of his Right to Testify

Petitioner next contends that his trial counsel was constitutionally ineffective, and violated his right to testify on his own behalf, by failing to advise him fully regarding whether he should testify at trial. Petitioner argues that his trial counsel should have educated him in the strategic implications of the decision whether to testify and should have informed him that the final decision was his to make. Petitioner further asserts that his testimony was important to the case and thus, counsel's error prejudiced his defense. The government responds that there is no reliable evidence to support petitioner's contention that he was not

informed of his right to decide whether to testify in his own defense. Moreover, the government argues that petitioner was not prejudiced as a result of his not testifying at trial.

At the outset, it is well settled that a criminal defendant has a constitutional right to testify in his own defense. *See Rock v. Arkansas*, 483 U.S. 44, 51-52 (1987). Trial counsel is charged with the responsibility of fully informing a defendant of his or her right to testify. Trial counsel's failure to advise the defendant of his or her right to testify, as well as the strategic implications of that choice, may constitute ineffective assistance under *Strickland*. *See United States v. Pennycooke*, 65 F.3d 9, 13 (3d Cir. 1995); *United States v. Teague*, 953 F.2d 1525, 1534 (11th Cir. 1992).

First, then, petitioner must demonstrate that his counsel failed to meet an "objective standard of reasonableness" in representing the petitioner. As noted above, it is unreasonable for counsel not to inform a defendant of his or her right to testify. *See Pennycooke*, 65 F.3d at 13; *Teague*, 953 F.2d at 1534. Trial counsel must also inform a defendant that the decision of whether or not to testify is ultimately for the defendant to make. *Teague*, 953 F.2d at 1534.

Petitioner in this case has submitted to the court several affidavits addressing conversations between himself and his trial counsel regarding his right to testify. Petitioner's own affidavit, as well as those of trial counsel Michael Querques and William DeMarco, indicate that there were several conversations concerning petitioner's potential testimony. However, petitioner states that, in the course of those discussions, his counsel never informed

him that the decision about whether he should testify was his decision to make. *See* Grecco Aff. at ¶¶ 1-10. Querques and DeMarco state that they do not recall specifically informing the petitioner that the ultimate decision of whether to testify rested with him. *See* Querques Aff. at ¶ 14; DeMarco Aff. at ¶ 13.

This court is not particularly persuaded by these affidavits. The petitioner certainly has an interest in submitting an affidavit which is favorable to his current petitioner. *See Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir. 1991) (holding that a habeas petitioner "must produce something more than a bare, unsubstantiated, thoroughly self-serving, and none too plausible statement that his lawyer" caused him not to testify at trial). Moreover, the fact that petitioner testified in his own defense in a previous state court case suggests that petitioner was aware of both his right to testify and his right to decide whether to testify in this case. *See* Grecco Aff. at § 10. The affidavits of trial counsel are not conclusive and do not substantiate petitioner's claim. Querques and DeMarco simply state that they do not recall informing petitioner of his right to decide whether to testify. *See* Querques Aff. at ¶ 14; DeMarco Aff. at ¶ 13. Certainly, a considerable amount of time has passed since the trial in this matter and it would be difficult to recall such specific conversations. Further, if it is true, as the petitioner alleges, that up until the moment the defense rested, he expected to be called as a witness, it would seem that petitioner's dissatisfaction at not being called would have surfaced at some earlier time. For instance, his dissatisfaction may have been noted on the record, raised on direct appeal, or at least expressed to counsel shortly after the trial. However, there is no prior evidence of petitioner's surprise or dissatisfaction at not

being called as a witness. Thus, petitioner's affidavit alleging that his counsel failed to inform him fully of his right to testify is not corroborated by any other source. Accordingly, this court does not find that petitioner has sustained his burden of demonstrating that counsel erred in failing to advise him adequately regarding his right to testify. There is no evidence that counsel's decision not to call petitioner to the stand was anything other than a reasonable tactical decision in this case.

Moreover, even if counsel did not fully inform petitioner of his right to testify, and thus committed error, petitioner must also demonstrate that counsel's error was prejudicial. Petitioner argues that his testimony would have had an important impact on the case; the jurors would have had an opportunity to assess his credibility and hear him deny his involvement in the offense. However, petitioner does not set forth any specific testimony he would have given and does not show how his testimony would rebut the government's case against him. According to petitioner's memorandum of law in support of his § 2255 motion, petitioner would have rebutted Galimi's testimony that some time after Mistretta's death petitioner gave Galimi a note reading, "Don't worry, the kid was crazy." Mem. at 29-30. Petitioner also asserts that he would have denied in front of the jury the government's allegations and Galimi's claim that petitioner killed Mistretta. *See* Mem. at 30. Such limited testimony, however, would not have significantly impacted either the government's case against petitioner or the outcome of the trial. *Compare United States v. Moskovits*, 844 F. Supp. 202, 207-209 (E.D. Pa. 1993) (ordering a new trial based on defendant's proffer of concrete testimony rebutting the government's version of events and noting that "had [the defendant's]

testimony consisted merely of so-called generalized denials. I would have serious reservations about ordering a new trial.").

Petitioner is correct that several courts have held that the standard for demonstrating prejudice is lessened somewhat when counsel's alleged error deprived the defendant of his fundamental right to testify. *See United States v. Tavares*, 100 F.3d 995, 998 (D.C. Cir. 1996); *Moskovits*, 844 F. Supp. at 208 n.8. Indeed, because of the significance of the defendant's testimony in the eyes of jurors, such testimony "is not lightly dismissed as unimportant." *See Moskovits*, 844 F. Supp. at 208. However, even assuming that the prejudice standard is somewhat "softened" in this instance, petitioner has not demonstrated a reasonable probability that the outcome of the case would have been different if he had testified. Defense counsel mounted a substantial attack on the government's case, and petitioner's testimony essentially denying his involvement in Mistretta' [sic] murder, given the potential areas of cross-examination, would have added little to his defense.[6] For these reasons, counsel's alleged error concerning petitioner's right to testify was not prejudicial and petitioner has not sustained his burden of proving ineffective assistance of counsel on that basis.

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[6] The parties dispute the extent to which petitioner's alleged prior criminal acts would have been admissible to impeach him under Federal Rules of Evidence 608 and 609. However, the parties seem to agree that, at least, the prosecution could have inquired, on cross-examination, about petitioner's past conviction for bribery and present charge of witness tampering. *See* Petitioner's Reply Memorandum, at 12-13; Government's Answer, at 29-30.

E. Failure to Contest the Finding in the Presentence Report that Petitioner Killed Mistretta

Next, petitioner contends that he received ineffective assistance of counsel at his sentencing.[7] He claims that his counsel should have contested the factual finding in the Presentence Report ("PSR") that petitioner killed Mistretta. Petitioner argues that the jury's verdict in this case represents its conclusion that petitioner is guilty of conspiracy to commit murder, the third charged predicate act, but does not necessarily indicate that petitioner is guilty of the actual murder of Mistretta. Petitioner thus asserts that his counsel at sentencing should have challenged the finding in the PSR that petitioner killed Mistretta. Specifically, petitioner contends that his counsel should have urged the court to require proof of petitioner's guilt in the actual murder by clear and convincing evidence, in accordance with *United States v. Kikumura*, 918 F.2d 1084, 1100-02 (3d Cir. 1990). The government argues that the verdict in this matter reflects the jury's determination that petitioner murdered Mistretta, and asserts that the factual findings in the PSR need only be supported by proof by a preponderance of the evidence.

Petitioner contends that his counsel at sentencing provided ineffective assistance in failing to challenge the finding in the PSR that petitioner murdered Mistretta. However, as defense counsel noted at petitioner's sentencing hearing, such an objection would have been futile. *See* S. at 6.[8] The Sixth Amendment does not require that

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[7] Petitioner was represented at sentencing by Michael Querques, Esq., William DeMarco, Esq., and Richard F. Regan, Esq.

[8] The citation "S." refers to pages of the transcript of the sentencing hearing held on November 11, 1991.

counsel make futile objections. *See Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990); *United States v. Grizales*, 859 F.2d 442, 447 (7th Cir. 1988). The jury in this case found petitioner guilty of conspiracy to murder Mistretta, with the overt act being petitioner's murder of Mistretta. The government's entire case focused on proving that petitioner murdered Mistretta and the jury found that the government had proven its case beyond a reasonable doubt. At sentencing, pertinent facts need only be proven by a preponderance of the evidence. *See McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986). Thus, in light of the jury verdict in this case, it would have been futile to suggest to the sentencing court that petitioner's murder of Mistretta could not be proven by a preponderance of the evidence.

Petitioner's reliance on *Kikumura* is misplaced. In that case, the sentencing court granted a departure from the applicable guideline range such that the sentence was altered from approximately 30 months to 30 years. In that instance, because of the magnitude of the contemplated departure, there was a danger of the sentencing hearing become "a tail which wags the dog of the substantive offense." 918 F.2d at 1101 (quoting *McMillan*, 477 U.S. at 88). In this case, there is no such danger. The jury made a finding as to the substantive offense and this court appropriately applied those findings in sentencing the petitioner. It was not unreasonable for defense counsel to refrain from objecting to the finding that petitioner murdered Mistretta; indeed, it would likely have been unreasonable for counsel to make such an objection.

Moreover, petitioner was not prejudiced by counsel's alleged error. Petitioner's co-defendant, Gatto, received an

identical sentence and he was not proven to be involved in the actual murder of Mistretta.

Accordingly, petitioner has failed to demonstrate that his counsel behaved unprofessionally at his sentencing and has not shown prejudice resulting from the alleged errors.

F. Cumulative Errors

Petitioner further contends that even if no single error by his counsel at trial and at sentencing amounts to ineffective assistance, the cumulative effect of the errors requires that this court grant petitioner's § 2255 motion. The government responds that since none of the alleged errors individually constitutes ineffective assistance of counsel, certainly there is no cumulative error.

The Third Circuit, as well as other courts, has acknowledged that although no error, standing alone, justifies the grant of a habeas corpus petition on the ground of ineffective assistance, the cumulative effect of the errors may warrant such relief. *See United States ex rel. Sullivan v. Cuyler*, 631 F.2d 14, 17 (3d Cir. 1980); *Crisp v. Duckworth*, 743 F.2d 580 583 (7th Cir. 1984). However, in the present case, this court has determined that counsel committed no error during petitioner's trial and sentencing. Accordingly, the cumulative effect of the alleged errors is no different than the effect of each individual alleged error: the petitioner received effective assistance and was not prejudiced by the conduct of his counsel.

Moreover, even if counsel did commit some degree of error in representing petitioner, that error was not sufficient to create a reasonable probability of a different outcome in the case. For the reasons noted throughout this opinion, any alleged error, whether considered individually or in combination with other errors, does not undermine confidence in the outcome of petitioner's trial and sentencing.

G. Newly Discovered Evidence

Finally, the court notes petitioner's argument that his claim of "prejudice" resulting from counsel's errors is bolstered by the existence of newly discovered evidence indicating that another person may have murdered Mistretta. Petitioner offers an affidavit from Lorraine DiGuilio in which she states that her brother Alan DiGuilio, now deceased, told her that he killed Mistretta. Her statement thus consists primarily of hearsay. The parties dispute whether Alan DiGuilio's statement would be admissible pursuant to an exception to the hearsay prohibition, specifically as a statement against interest under Federal Rule of Evidence 804(b)(3).

First, as discussed earlier, the *Strickland* prejudice inquiry turns on whether there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. Thus, prejudice is determined based upon the probability, if any, that counsel's errors impacted the outcome of the proceeding. Here, petitioner does not argue that because of counsel's errors, Lorraine DiGuilio's testimony was not presented at trial. Thus, the prejudice suffered as a result of her testimony not being introduced

at trial is not traceable to any error on the part of counsel. As such, this evidence is not relevant to the determination of prejudice in the *Strickland* analysis.

Thus, this evidence is not the proper subject of a § 2255 motion. It is well-established that the only acceptable bases for habeas corpus relief are violations of the federal constitution or federal law. *See Herrera v. Collins*, 506 U.S. 390, 400 (1993); *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923). Indeed, "claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera*, 506 U.S. at 400, 408-14 (noting that newly discovered evidence may be the basis for a motion for a new trial or a request for clemency, but not a habeas corpus petition). In this case, the newly discovered evidence is not associated with any constitutional violation. Indeed, this court has determined that no constitutional violation occurred. Accordingly, in the absence of an independent constitutional violation, the newly discovered evidence proffered by the petitioner is not relevant to the present habeas corpus petition.

Moreover, the Court in *Herrera* went on to consider, assuming arguendo that newly discovered evidence alone did warrant habeas corpus relief, whether the evidence offered in that case warranted such relief. 506 U.S. at 417-19. There, as here, the petitioner's new evidence was in the form of affidavits, consisting primarily of hearsay statements. *Id.* at 417. The Court noted that the affidavits were suspect in light of the fact that they surfaced at the eleventh hour, eight years after trial and after the death of the alleged real perpetrator. *Id.* at 417-18. Likewise, the

affidavits in this case came to light six years after petitioner's trial and conviction and after the death of the alleged perpetrator, Alan DiGuilio.

For these reasons, the newly discovered evidence proffered by the petitioner does not impact this court's finding that habeas corpus relief is not warranted in this case.

Therefore, in sum, it is this court's determination that petitioner's counsel both at his trial and his sentencing were not only competent, but highly competent. At all stages, from the pre-trial suppression hearing before Judge Brotman, to the trial and sentencing before this court, petitioner's counsel provided him with a vigorous and multi-faceted defense. Having observed counsel's conduct at the trial and sentencing, I have no doubt that petitioner received effective assistance in presenting his defense. Moreover, it is important to note that "[t]he sixth amendment does not entitle a defendant to perfection but to basic fairness." *United States v. Aiello*, 900 F.2d 528, 534 (2d Cir. 1990). Petitioner received not only basic fairness from his counsel in this matter, but a high degree of professional competency. Petitioner's able counsel engaged in a "full court press" in his defense. I have the utmost confidence in both the procedural fairness and the outcome of petitioner's trial and sentencing.

Accordingly, petitioner's motion pursuant to § 2255 to vacate, set aside, or correct his sentence, based on ineffective assistance of counsel, is denied in all respects.

II Illegal Sentence

Petitioner also contends that his sentence was imposed in violation of his due process rights and in violation of the ex post facto clause of the United States Constitution. Essentially, petitioner asserts that this court erroneously sentenced him pursuant to United States Sentencing Guideline § 2A1.1, governing First Degree Murder, rather than § 2A2.1, governing Assault with Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; and Attempted Murder. Petitioner argues that this court's decision to apply § 2A1.1 was based upon a reading of § 2A5.1, a 1990 amendment to the Guidelines. Petitioner contends that consideration of the 1990 amendment was improper because the parties agreed to use the 1988 Guidelines in calculating petitioner's sentence and that the increased sentence resulting from application of the 1990 amendment constitutes an ex post facto violation. The government first responds that because this issue was fully litigated on direct appeal, the court may decline to address it at this time. But even if the court does address the claim, the government asserts that the argument is without merit; specifically, the government argues that petitioner's sentence would be the same whether or not the court considered the 1990 amendment.

It is well-established that a court may, in its discretion, decline to consider an issue which is asserted as a basis for relief under § 2255 when the issue was previously fully and fairly litigated. *See United States v. Palumbo*, 608 F.2d 529, 532-33 (3d Cir. 1979); *United States v. Orejuela*, 639 F.2d 1055, 1057 (3d Cir. 1981). Indeed, it has been held that:

> in the absence of newly discovered evidence that could not reasonably have been presented at the

> original trial, a change in applicable law, incompetent prior representation by counsel, or other circumstances indicating that an accused did not receive full and fair consideration of his federal constitutional and statutory claims, a § 2255 petitioner may not relitigate issues that were adjudicated at his original trial and on direct appeal.

Palumbo, 608 F.2d at 533. Petitioner in this case asserts that there have been changes in the law which warrant reconsideration of his sentence. Petitioner cites *Stinson v. United States*, 508 U.S. 36, 44-46 (1993), and *United States v. Corrado*, 53 F.3d 620, 621 (3d Cir. 1995), as intervening case law that should alter this court's previous analysis. The government suggests that this "new" law does not alter the petitioner's original sentence.

This court agrees with the government and finds that the holdings in *Stinson* and *Corrado* do not alter the bases for petitioner's previous sentence. First, *Stinson* provides that certain commentary in the Sentencing Guidelines should be considered authoritative. 508 U.S. at 44-45. Petitioner contends that the sentencing court should have given due weight to the commentary to § 2X1.1. However, although the court noted the government's position that § 2X1.1 was applicable in this case, the court did not base its sentence on that section. *See* S. 45. Thus, application of the commentary to § 2X1.1 does not alter the court's previous ruling. Second, *Corrado* adopts the "one book rule," which means that a criminal defendant must be sentenced completely within one set of Guidelines. 53 F.3d at 621. Therefore, the petitioner asserts, he should have been sentenced exclusively under the 1988 Guidelines, with no reference to the 1990 amendment. However, this court expressly indicated that the applicability of § 2A1.1

in the present case was clear both before and after the 1990 amendment. *See* S. 46. Thus, petitioner's sentence was not premised on the court's reading of the 1990 amendment.

Therefore, because the intervening law cited by the petitioner does not impact the bases for this court's previous sentence, there is no reason to reconsider the issue at this time. The issue was previously litigated and decided both by this court and by the Court of Appeals. *See* S. 44-46; *Gatto*, 995 F.2d at 450 n.1. As such, this court declines to revisit the issue in the context of petitioner's § 2255 motion.

Moreover, even if this court were to re-examine petitioner's claim, I would once again find it without merit. The parties agreed that § 2E1.1 is the sentencing provision applicable to RICO claims. That section directs the court to apply "the offense level applicable to the underlying racketeering activity." Further, the introductory commentary to § 2E1.1 indicates that the court should usually apply the offense level of the underlying conduct. Petitioner was convicted of conspiracy to murder Vincent Mistretta, with the overt act being the murder of Mistretta. The sentencing provision applicable to murder is § 2A1.1. Accordingly, petitioner's sentence was imposed pursuant to the 1988 Guidelines and did not violate petitioner's due process rights or the ex post facto clause.

For the foregoing reasons, petitioner's motion, pursuant to 28 U.S.C. § 2255, to vacate, set aside, or correct his sentence, is denied in its entirety.

/s/ Harold A. Ackerman
Hon. Harold A. Ackerman,
U.S.D.J.

AMENDED BPS-125 **March 14, 2001**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 00-1861

ALAN GRECCO, CRIM NO. 89-250,

Appellant

vs.

USA

(D.N.J. CIV. NO. 97-cv-02098)

Present: SCIRICA, ROTH AND MCKEE, *Circuit Judges*

Submitted are:

(1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1);

(2) Appellant's memorandum of law in support thereof;

(3) Appellee's response in opposition thereto;

(4) Appellant's reply thereto;

(5) Appellee's motion to strike reply; and

(6) Appellant's opposition to motion to strike reply, in the above-captioned case.

Respectfully,

Clerk

Received and Filed
/s/ Marcia M. Waldron
Marcia M. Waldron
Clerk

MMW/JDM

ORDER

The foregoing request for a certificate of appealability is granted, limited to the issue of whether trial counsel provided ineffective assistance in failing to advise Grecco fully as to his right to testify. The Clerk shall consolidate this appeal with the appeal at C.A. No. 00-2970. We note that Grecco's claim under *Apprendi v. New Jersey,* 530 U.S. 466 (2000), is without merit (assuming *arguendo* that *Apprendi* even applies to cases on collateral review). Grecco was sentenced to 20 years on each RICO count and 5 years on each remaining count; he was not sentenced on any count above the statutory maximum. Thus, Grecco's *Apprendi* challenge based on the facts used in calculating his offense level under the Guidelines must fail. *See United States v. Williams,* 235 F.3d 858, 862-63 (3d Cir. 2000) (holding that *Apprendi* rule did not apply to the extent defendant's sentence under Guidelines was increased by sentencing finding given that sentence imposed did not exceed statutory maximum). Likewise, Grecco's challenge to the imposition of the sentences consecutively, as opposed to concurrently, is without merit. *See United States v. White,* 240 F.3d 127 (2d Cir. 2001). Thus, a certificate of appealability is denied on the *Apprendi* claim. The government's motion to strike Grecco's reply memorandum and appendix is denied as moot.

By the Court,

/s/ Judge Jane R. Roth
Circuit Judge

Dated: 23 MAR 2001
[Illegible]

AMENDED BPS-126 **March 14, 2001**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 00-2970

ALAN GRECCO, CRIM NO. 89-250,

Appellant

vs.

USA

(D.N.J. CIV. NO. 97-cv-02098)

Present: SCIRICA, ROTH AND MCKEE, *Circuit Judges*

Submitted are:

(1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1);

(2) Appellant's memorandum of law in support thereof;

(3) Appellee's response in opposition thereto;

(4) Appellant's reply thereto;

(5) Appellee's motion to strike reply; and

(6) Appellant's opposition to motion to strike reply, in the above-captioned case.

Respectfully,

Clerk

Received and Filed
/s/ Marcia M. Waldron
Marcia M. Waldron
Clerk

MMW/JDM

ORDER

The foregoing request for a certificate of appealability is granted, as the evidence that Grecco presented in support of the Rule 60(b) motion was submitted, at least in part, to support his claim that trial counsel provided ineffective assistance in failing to advise Grecco fully as to his right to testify. In C.A. No. 00-1861, we have granted a certificate of appealability on that claim, and thus the parties should address whether the District Court erred in denying the Rule 60(b) motion as it pertained to that claim. The Clerk shall consolidate this appeal with the appeal at C.A. No. 00-1861. For the reasons explained in the certificate of appealability order entered to C.A. 00-1861, the government's motion to strike Gercco's reply memorandum and appendix is denied as moot.

By the Court,

/s/ Judge Jane R. Roth
Circuit Judge

Dated: 23 MAR 2001
[Illegible]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 00-1861 & 00-2970

ALAN GRECCO,

Appellant

v.

UNITED STATES OF AMERICA

(D.C. Civ. No. 97-cv-2098)

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge,* SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, ROSENN*, *Circuit Judges,* and KANE**, *District Judge*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision

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* As to panel rehearing only

** The Honorable Yvette Kane, United States District Judge for the Middle District of Pennsylvania, who sat by designation, as to panel rehearing only.

having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

By the Court,

/s/ [Illegible]
Circuit Judge

Dated: 03 APR 2002

CRUMMY, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
A Professional Corporation
One Riverfront Plaza
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(201) 596-4500
Attorneys for Petitioner Alan Grecco

UNITED STATES OF AMERICA, Respondent, v. ALAN GRECCO, Petitioner.	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY Criminal No. 89-250 (HAA) Civil No. 97-2098 (HAA) Before the Honorable Harold A. Ackerman, U.S.D.J.

I, Alan Grecco, hereby certify as follows:

1. On several occasions prior to the criminal trial in the above captioned matter, I discussed whether I should testify with my attorney, William J. DeMarco, Esq. Most of these discussions took place in Mr. DeMarco's office. I repeatedly informed Mr. DeMarco that I wanted to testify.

2. Mr. DeMarco told me that he agreed that I should testify, and that it was important that I tell my side of the story and "humanize" myself for the jury.

3. Mr. DeMarco and I had essentially the same conversation more than once during the course of the trial.

4. I also generally discussed whether I should testify with another of my attorneys, Michael A. Querques, Esq. Prior to the trial, Mr. Querques initially told me that it was his policy that his clients who were criminal defendants should not testify.

5. After Mr. Querques got to know me better, he told me that he thought I could take the stand.

6. During the trial, I told Mr. Querques that I wanted to testify to rebut the testimony of Robert Belli, Frank Galimi, and Howard Clarke.

7. Nevertheless, Mr. Querques rested for the defense without calling me to testify. After he rested, he told me, "I think enough has been done."

8. My attorneys never told me that whether or not I would testify was my decision to make.

9. Up until the moment Mr. Querques rested, I expected to be called as the last witness in my defense.

10. I testified in my own behalf in a previous case, when I was tried in Bergen County in 1978 for possession of burglary tools and breaking and entering. I testified as the last witness in the defense case and was acquitted of the charges.

I hereby certify under penalty of perjury that the foregoing statements made by me are true and correct.

/s/ Alan Grecco
Alan Grecco

DATED: September 10, 1997

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Attorneys for Petitioner Alan Grecco

UNITED STATES OF AMERICA, Respondent, v. ALAN GRECCO, Petitioner.	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY Criminal No. 89-250(HAA) Civil No. 97-2098(HAA) Before the Honorable Harold A. Ackerman, U.S.D.J.

I, Michael A. Querques, Esq., hereby certify as follows:

1. Along with William J. DeMarco, Esq., I was trial counsel for Alan Grecco in the above-captioned matter.

2. As part of the defense team, I was involved in determining what witnesses we should call.

3. To the best of my recollection, we never considered calling an expert on eyewitness identification.

4. We did not contact an expert on eyewitness investigation, nor did we look into what such an expert

could have testified to in this case, or whether that testimony would have been admissible.

5. To the best of my recollection, after the Third Circuit reversed Judge Brotman's decision barring Frank Galimi's testimony regarding his alleged identification of Mr. Grecco, we never discussed calling an expert on astigmatism.

6. We never contacted an expert on astigmatism and did not investigate what such an expert could testify to regarding Frank Galimi. We did not request that Frank Galimi be examined by a defense expert on astigmatism.

7. We were not aware of Frank Galimi's two 1983 hospitalizations or his 1983 psychiatric evaluation until after Galimi's cross-examination had commenced.

8. We were not aware of the full extent of Vincent Mistretta's documented and diagnosed psychological problems until the prosecutor belatedly produced some of Mistretta's medical records late in the trial. In light of the court's ruling barring the proposed testimony of Dr. William Annitto and the length of the defense case, we did not attempt to call an expert on Mistretta's psychological problems at that time.

9. In light of the jury's verdict, I did not consider challenging the finding in the Presentence Report that Mr. Grecco actually killed Vincent Mistretta.

10. As a general philosophy, I do not believe in using expert witnesses, and prefer to attack eyewitness testimony through cross-examination.

11. Prior to the trial, Mr. Grecco told me that he wanted to testify on his own behalf. I informed him that I generally did not believe my clients in criminal cases should testify.

12. On another occasion, Mr. Grecco repeated that he wanted to testify. I informed him that I felt that he carried himself and expressed himself well enough to testify should it prove necessary.

13. I do not specifically recall discussing with Mr. Grecco during the course of the trial whether or not he should testify.

14. I do not specifically recall informing Mr. Grecco whether or not the ultimate decision as to whether he would testify was his to make.

I hereby certify under penalty of perjury that the foregoing statements made by me are true and correct.

/s/ Michael A. Querques
Michael A. Querques

DATED: September 27, 1997

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Attorneys for Petitioner Alan Grecco

UNITED STATES OF AMERICA, Respondent, v. ALAN GRECCO, Petitioner.	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY Criminal No. 89-250 (HAA) Civil No. 97-2098 (HAA) Before the Honorable Harold A. Ackerman, U.S.D.J.

I, William J. DeMarco, Esq., hereby certify as follows:

1. Along with Michael A. Querques, Esq., I was trial counsel for Alan Grecco in the above-captioned matter.

2. Prior to and during the course of the trial, I participated as part of the defense team in assessing what defense witnesses should be called.

3. To the best of my recollection, the defense team never discussed calling an expert on eyewitness identification.

4. The defense team never contacted a potential expert on eyewitness investigation, and did not investigate what such an expert could have testified to in this case, or whether that testimony would have been admissible.

5. To the best of my recollection, after the Third Circuit reversed Judge Brotman's decision barring Frank Galimi's testimony regarding his alleged identification of

Mr. Grecco, the defense team never discussed calling an expert on astigmatism.

6. The defense team never contacted an expert on astigmatism regarding Frank Galimi, never investigated what such an expert could testify to, and never requested that Frank Galimi be examined by a defense expert on astigmatism.

7. The defense team was not aware of Frank Galimi's two 1983 hospitalizations or his 1983 psychiatric evaluation until Galimi's cross-examination was underway.

8. The defense team did not learn of the full extent of Vincent Mistretta's documented and diagnosed psychological problems until the prosecutor belatedly produced some of Mistretta's medical records late in the trial. In light of the Court's ruling barring the proposed testimony of Dr. William Annitto and the length of the defense case, we did not attempt to call an expert on Mistretta's psychological problems at that time.

9. On several occasions prior to the trial, I discussed with Mr. Grecco whether he should testify.

10. Mr. Grecco repeatedly expressed his desire to testify.

11. I informed Mr. Grecco that I agreed that his testimony might be helpful.

12. On several occasions during the course of the trial, Mr. Grecco repeated his desire to testify, and I repeated that I believed that his testify [sic] might be helpful.

13. I do not recall informing Mr. Grecco whether or not the ultimate decision as to whether he would testify was his to make.

I hereby certify under penalty of perjury that the foregoing statements made by me are true and correct.

/s/ William J. DeMarco
William J. DeMarco

DATED: September 24, 1997

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Alan Grecco, Petitioner, v. United States Of America, Respondent.	)	Civil No. 97-2098 (HAA) Crim. No. 89-250 (HAA) (J. Ackerman)

Supplemental Affidavit Of Alan Grecco

ALAN GRECCO, being duly sworn on his oath according to law, deposes and says:

1. This supplemental affidavit specifically sets forth my proposed testimony that would have been given at trial to rebut the testimony of Frank Galimi, Howard Clarke, and Robert Belli.

A. Frank Galimi

1. I saw Vincent Mistretta about two weeks prior to his death at Rockys Luncheonette in Lodi. He started acting strange so I asked him to please leave, I knew that he had mental problems. An argument followed and myself and two other men threw him out of the luncheonette. Mistretta's shirt was torn in the scuffle.

2. Mistretta then went to the Lodi Police Station and came back with two police officers. Mistretta got out of the police car and got into his car and left. *See* Exhibit A, Bergen County Police Report from Investigator David Does at pg. 1-2, lines 28-37, dated April 26, 1979. I never saw Mistretta after that day.

3. After the argument I had with Mistretta, he was going around the town of Lodi slandering me. Myself and my father-in-law Louis Gatto went to see Mistretta's uncle Sam La Duca who was a friend of ours. We explained to Sam what was going on with his nephew Vinny (Mistretta) and he said he would take care of it. Sam got on the phone and called his son Anthony La Duca and Sam then put my father-in-law on the phone. My father-in-law asked Anthony La Duca to speak to his cousin Vinny, and to have him stop knocking his son-in-law Al. *See* Exhibit B, Anthony La Duca's trial transcript Vol. 19 at pg. 2845, lines 23-25 and pg. 2846, lines 106. That was the only time I ever had a problem with Vincent Mistretta. It was a very minor incident.

4. On April 26, 1979 Steve (Stefano) Mazzola picked me up at my home in Lodi around 7:30 P.M. I suggested to him that we go to the Service Diner on River Road, Garfield for something to eat. I would often go to the Service Diner to meet some of my gambling customers. *See* Exhibit C, Bergen County Police Report from Det. John David at pg. 1, lines 8-10, dated April 30, 1979. Steve and I arrived at the Service Diner around 7:45 P.M. When we entered the diner I saw Lieutenant Al Perno and a woman seated with him. They were having dinner. Steve and I walked to the rear of the diner and came upon Dennis "Red" Serpone and a friend of his whom I did not know. Mr. Serpone invited Steve and myself to sit with them which we did. *See* Exhibit D, Bergen County Police Report from Det. John David at pg. 2, lines 2-7, dated April 27, 1979.

Steve and I ordered some food and coffee and stayed with Mr. Serpone and his friend until approximately 8:15 P.M. We then left the Service Diner and went to the Meadowlands Race Track for a couple of races. I often did this

because the race track is close to where I live. After several races Steve and I decided to go home.

5. On the way home from the race tack I asked Steve to stop at the George Michaels Diner on Route 46 Lodi. I went into the diner to buy the early edition of the New York Daily Newspaper. When I was coming out of the diner I met two Lodi police officers, Det. John Pizzuro and Capt. Mike Cirello. They told me that there was an alarm out for me for a homicide and that I was under arrest. I was surprised at this and as we walked to the police car I told Capt. Cirello that I wanted to give my friend Steve a tri-fecta ticket to cash for me. I walked over to Steve who was sitting in his car and handed him the tri-fecta ticket. *See* Exhibit E, Supplementary Offense Report Police Department, Lodi, New Jersey, No. 35011 dated April 26, 1979. I was concerned about that ticket because it had names and figures on the back of it. It was a pay and collect sheet and I didn't want to get charged with gambling records. I also had $1,786.00 in cash on me but the officers would not allow me to give Steve the money. I got a receipt for the money at the Lodi Police Department. *See* Exhibit A at pg. 2, lines 4-10. I also asked Steve to go to my home and tell my wife what was happening, and to have her call my lawyer Mr. DeMarco which he did. I was taken into custody by the Lodi Police about 10:30 P.M. on 4-26-79. *See* Exhibit F, Department of Police, Garfield, N.J. report of Lt. Salvatore J. Ricciardi at pg. 1, lines 12-14, dated 4-26-79.

6. I was transported back and forth between Lodi and Garfield Police Stations that night. My clothes were taken from me and the next day I was released from custody.

7. I did not have any reason to harm Vincent Mistretta and I did not kill him.

8. I did not see Frank Galimi on the night of 4-26-79 nor was I on the street where the homicide took place.

9. After Vincent Mistretta's death from time to time I would run into Frank Galimi by himself or with his wife. We would exchange greetings. Mr. Galimi never once mentioned Mistretta's death to me or showed any ill feelings towards me.

B. Howard Clarke

1. Howard Clarke was a bookmaker who started giving me sports bets or lay off bets. There came a time when he owed me about $10,000.00. He told me that he was having a hard time collecting the money from his betting customers and therefore he couldn't pay me.

2. I stopped taking bets from him and made arrangements with him to pay me $300.00 per week until the $10,000.00 was paid off. He paid me for several weeks, and then stopped paying. I went to his house and spoke to him about the payments he missed. We were standing outside of his house while speaking. I was angry with him for not keeping his part of the bargain with me and as I was speaking to him I pointed my finger at him, but never slapped him in the face as he claimed in court.

3. At the same time I was talking to Howie about our problem I didn't know that his partner John Haas was sitting in the car across the street from us and saw us.

4. John Haas has said he never saw me slap Howie and after I left, Howie went over to John's car and their [sic] wasn't any marks of any kind on Howie's face according to

John. *See* Exhibit G, Trial Transcript Vol. 39 at pg. 5703 line 25 through pg. 5706 ending on line 10.

5. I tried to avoid problems in the bookmaking business. When someone owed me money and they could not pay I always tried to make a deal with them to pay me whatever they could afford to pay per week, or per month, etc.

6. I knew Howie's father-in-law Andy Voto who was the Chief of Police in Lodi for a long time. I also knew Howie's wife, his sister-in-law, and his mother-in-law. Lodi is a small town where everyone just about knows one another. I certainly would not want to have any kind of problems with the Chief of Police in the town where my family and I live, by slapping the Chief of Police's son-in-law.

C. Robert "Maxi" Belli

1. Robert Belli and I knew each other all our lives. I went to grade school with him, he was a few years older than me. I had been to his home where he lived with his first wife Sue quite often to play poker. I knew his two sons, Tommy and Bobby. I had a good relationship with the entire Belli family.

2. The only time I had a problem with Robert Belli was in the late sixties when we had a fist fight in his nephew Sal Bonura's Bar. We both had been drinking at the time and if not for the drinking it would have never happened.

3. When Robert Belli was beaten up by two young men with bats I had nothing to do with that. I was never questioned by the police and according to Belli's trial testimony Belli never said I did it. *See* Exhibit H. Trial Transcript Vol. 11 at pg. 1698 line 20 through pg. 1699 ending on line 18.

4. When Artie Belli went to jail around 1975-1976 I was bookmaking in the Lodie Garfield area. Some of Arties customers started to bet with me. I never told Robert Belli that he had to get out of the gambling business. At the time he claims I did, he wasn't even in the bookmaking business to the best of my knowledge.

5. When Robert Belli was financially broke I got him a job as a chef in my friends restaurant. From time to time I would lend him money. I also took him to play golf with me several times. He didn't have any reason to fear me as the prosecutor led him to say at trial.

/s/ Alan Grecco
Alan Grecco

Dated: May 23 2000.

Sworn and subscribed to

before me this 23 DAY OF May 2000.

/s/ [Illegible] Case Manager,
Authorized by this Act of July 7,
1955, as amended to administer
oaths (18 USC 4004).

_____
Notary Public